

# **EXHIBIT HHH**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MCDONALD'S CORPORATION, )  
Plaintiff, )  
vs. ) No. )  
1:19-cv-06471 )  
VANDERBILT ATLANTIC ) (DLI) (SLT)  
HOLDINGS LLC, )  
Defendant. )  
----- )

REMOTE VIDEOTAPED DEPOSITION OF  
MICHAEL P. HEDDEN  
Lawrenceville, New Jersey  
Thursday, January 20, 2022

Reported By:  
CATHI IRISH, RPR, CRR, CLVS

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January 20, 2022

11:08 a.m.

Remote videotaped deposition of  
MICHAEL P. HEDDEN, with all  
participants appearing via  
videoconference, before Cathi Irish, a  
Registered Professional Reporter,  
Certified Realtime Reporter, and  
Notary Public of the State of  
New York.

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A P P E A R A N C E S:

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PASHMA STEIN WALDER HAYDEN, P.C.

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Attorneys for Plaintiff

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21 Main Street

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Hackensack, New Jersey 07601

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BY: BRENDAN M. WALSH, ESQ.

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DENISE ALVAREZ, ESQ.

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MEISTER SEELIG & FEIN LLP

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Attorneys for Defendant

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125 Park Avenue

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New York, New York 10017

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BY: HOWARD S. KOH, ESQ.

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19

ALSO PRESENT:

20

MARCELO RIVERA, videographer

21

CHELSEA GILCHRIST, Veritext concierge

22

MICHAEL MEYER

23

STACY HOWARD

24

AMANDA AARON

25

SHARYL AMOVITZ

1  
2 THE VIDEOGRAPHER: Good morning.  
3 We're going on the record at  
4 11:08 a.m. on January 20, 2022.

5 This deposition is being taken  
6 remotely of Mr. Michael Hedden in the  
7 matter of McDonald's Corporation  
8 versus Vanderbilt Atlantic Holdings  
9 LLC.

10 My name is Marcelo Rivera and I  
11 am the videographer. The court  
12 reporter is Cathi Irish in association  
13 with Veritext Legal Solutions.

14 I am not related to any party in  
15 this action, nor am I financially  
16 interested in the outcome.

17 Counsel and all present remotely  
18 will now state their appearances and  
19 affiliations for the record. If there  
20 are any objections to proceeding,  
21 please state them at the time of your  
22 appearance beginning with the noticing  
23 attorney.

24 MR. WALSH: Good morning. My  
25 name is Brendan Walsh. I'm an

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attorney at the law firm of Pashma  
Stein Walder Hayden and I represent  
the plaintiff, McDonald's Corporation  
in this matter.

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MR. KOH: Howard Koh, Meister  
Seelig & Fein. I represent the  
defendant, Vanderbilt Atlantic  
Holdings LLC.

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M I C H A E L H E D D E N, called as  
a witness, having been duly sworn by a  
Notary Public, was examined and  
testified as follows:

14

EXAMINATION

15

BY MR. WALSH:

16

17

Q. Good morning again, Mr. Hedden.  
How are you today?

18

19

20

21

22

23

A. Well, Mr. Walsh. How are you?

Q. Good, thanks. So you've just  
been sworn in and you understand that  
although we're not in court, you are under  
oath and obligated to tell the truth. Do  
you understand that?

24

25

A. Yes.

Q. Okay. And you've been deposed

1 HEDDEN

2 before; right?

3 A. Yes.

4 Q. About how many times do you  
5 think?

6 A. I would say conservatively 25  
7 times.

8 Q. Okay, so you're comfortable with  
9 the process then; right?

10 A. Yes.

11 Q. Okay. So as you know, there's a  
12 court reporter here who is taking  
13 everything down. I will ask the questions  
14 and you will answer. If you don't  
15 understand a question for any reason, just  
16 let me know. If you answer the question,  
17 I'm going to assume you understood it.

18 Please answer your questions verbally with  
19 words. The court reporter can't take down  
20 any nods or hand signals and especially  
21 because we're doing this remotely through  
22 Zoom, it's important that you let me  
23 finish speaking before you start speaking  
24 and I'll do the same for you. The court  
25 reporter can't take it all down if we're

1 HEDDEN

2 speaking at the same time. Do you  
3 understand that?

4 A. I do.

5 Q. Okay. So Vanderbilt's attorney,  
6 Mr. Koh, may object to some of my  
7 questions but you'll still be required to  
8 answer my questions unless he directs you  
9 not to answer for some reason.

10 If you need a break, just let me  
11 know and I'm happy to take one. The only  
12 thing I ask is that you answer any pending  
13 questions before we take a break but  
14 you're in charge today as far as breaks so  
15 just let me know and I'm happy to  
16 accommodate you.

17 Do you understand all these  
18 instructions?

19 A. I do.

20 Q. Okay. Is there any reason that  
21 you are not able to give your best and  
22 most accurate testimony today?

23 A. No, there's no reason.

24 Q. Okay. And I heard you say  
25 earlier that you're taking the deposition



1 HEDDEN

2 from Lawrenceville, New Jersey today; is  
3 that right?

4 A. Yes.

5 Q. Are you in the room alone?

6 A. Yes, I am.

7 Q. Can you just describe what you  
8 see in front of you as far as the screens  
9 that you have in front of you?

10 A. I have the monitor in front of me  
11 which I'm watching you, I can see myself  
12 in the background. I see a box with those  
13 in the gallery format for those that are  
14 in attendance here, yourself, Mr. Koh and  
15 any others. I see on my other monitor  
16 over here the Veritext Exhibit Share  
17 screen which I will then use to view the  
18 exhibits as they are posted, and that is  
19 what I see in front of me.

20 Q. Okay. So it sounds like you have  
21 the Zoom program open, you've got Veritext  
22 Exhibit Share and you don't have any other  
23 programs open; is that right?

24 A. That is correct.

25 Q. Okay. And do you understand that

1 HEDDEN

2 you're not permitted to have any private  
3 conversations or chats with anyone while a  
4 question is pending?

5 A. Oh, yes, I do.

6 Q. Okay. All right. So what, if  
7 anything, did you do to prepare for your  
8 deposition today?

9 A. I read my expert report. I read  
10 the expert report that was prepared by  
11 Mr. Tom Tener of KTR in this matter. I  
12 looked at the footnotes and the references  
13 that I made in my expert report, and  
14 that's about it.

15 Q. Did you meet with counsel in  
16 preparation for your deposition today?

17 A. I had a conversation with counsel  
18 last week.

19 Q. Okay. Was that -- that was just  
20 a phone call?

21 A. Yes.

22 Q. And who participated in that  
23 phone call?

24 A. Mr. Koh and myself.

25 Q. Nobody else?

1 HEDDEN

2 A. No.

3 Q. And about how long did that  
4 telephone call last?

5 A. I think it was about 30 to 45  
6 minutes.

7 Q. Okay. Now, did you meet or speak  
8 with anyone else in preparation for your  
9 deposition today?

10 A. No.

11 Q. Okay. And other than the  
12 documents that you just referenced, did  
13 you review any other documents in  
14 preparation for your deposition today?

15 A. I did look at the addendum to the  
16 lease to refresh my recollection but other  
17 than what I've just testified to, no, I  
18 have not looked at anything else.

19 Q. Okay. And other than the  
20 November 12, 2021 expert report, have you  
21 authored any other documents in connection  
22 with the case?

23 A. No.

24 Q. Okay. Have you ever spoken with  
25 Tom Tener?

1 HEDDEN

2 A. Yes.

3 Q. Okay, and when was the last  
4 time --

5 A. But not in this matter.

6 Q. Okay. So when was the last time  
7 you spoke with Mr. Tener?

8 A. It had to have been after COVID  
9 so it was after March of 2020 so I'm going  
10 to have to say it was probably in late  
11 2020.

12 Q. Okay. And were you working with  
13 him on another matter?

14 A. Yes.

15 Q. What type of matter was that?

16 A. It was a matter that while I was  
17 employed at Houlihan Lokey, it was a  
18 matter we called the -- hang on -- Miami  
19 Freedom Park, Miami Freedom Park, MFP, it  
20 was Miami Freedom Park.

21 Q. So what was your role in that  
22 project and what was Mr. Tener's role?

23 A. I was an appraiser working on  
24 behalf of the City of Miami to estimate  
25 the value of a ground lease that was under

1 HEDDEN

2 negotiation between the developer and the  
3 City and Mr. Tener's role was as a  
4 reviewing appraiser.

5 Q. Okay. And so you said it was the  
6 value of a ground lease. Was it -- what  
7 do you mean by the value of a ground  
8 lease, were you trying to determine fair  
9 market rental value?

10 A. Yes.

11 Q. Okay. And were you both working  
12 on behalf of the City of Miami?

13 A. No.

14 Q. Who was he working for?

15 A. I believe he was hired as an  
16 independent third-party review appraiser  
17 engaged by I think jointly between the law  
18 firm and the developer, the law firm on  
19 behalf of the City and the developer.

20 Q. Okay. And did you -- do you know  
21 if Mr. Tener agreed with the conclusions  
22 you reached in that matter?

23 A. I am unaware.

24 Q. So you never saw his review so  
25 you're not sure whether he found it

1 HEDDEN

2 credible or reasonable?

3 A. That's correct.

4 Q. Okay. And how many other times  
5 have you worked with Mr. Tener?

6 A. Not before that matter ever.

7 Q. Okay. Mr. Hedden, have you ever  
8 gone by any other names?

9 A. No.

10 Q. Okay. Where did you attend  
11 college?

12 A. That's an interesting question.  
13 I've never been asked that one before.  
14 Sorry. Aliases are not my thing.

15 I went to the University of  
16 Bridgeport in Bridgeport, Connecticut and  
17 I attended the university -- Rutgers  
18 University.

19 Q. Okay. And what was your degree  
20 in from the University of Bridgeport?

21 A. It was a degree of business  
22 administration with a focus on marketing.

23 Q. Okay. And when did you graduate?

24 A. 1976.

25 Q. And how about from Rutgers, what

1 HEDDEN

2 was your degree?

3 A. It was a master's in city and  
4 regional planning, also references an MCRP  
5 degree.

6 Q. When was that?

7 A. 1998.

8 Q. Where do you currently reside?

9 A. I currently reside at 2700  
10 Princeton Pike, Lawrenceville, New Jersey.

11 Q. How long have you lived in  
12 Lawrenceville?

13 A. Since 1988.

14 Q. Have you ever lived in any of the  
15 boroughs of New York City?

16 A. No.

17 Q. Have you ever worked in any of  
18 the boroughs of New York City and when I  
19 say worked, I mean your office was located  
20 there?

21 A. Yes.

22 Q. When was that?

23 A. My office was located in  
24 New York City in Manhattan when I worked  
25 at Landauer Associates and then when I

1 HEDDEN

2 worked at American Appraisal, when I  
3 worked at FTI Consulting and when I worked  
4 at Houlihan. Those were located in  
5 Manhattan.

6 Q. Have you ever worked full-time at  
7 an office in Brooklyn?

8 A. No.

9 Q. Okay. How long have you been a  
10 licensed appraiser?

11 A. I have been a licensed appraiser  
12 since 1992 to my best recollection when  
13 they enacted the licensing law.

14 Q. Was that first license in  
15 New Jersey?

16 A. Yes.

17 Q. And when did you become certified  
18 or licensed to appraise properties in  
19 New York?

20 A. I do not recall exactly.

21 Q. Was it before or after you became  
22 licensed in New Jersey?

23 A. After.

24 Q. Okay. And why were you  
25 certified -- or why did you become



1 HEDDEN

2 licensed in New Jersey first?

3 A. Because at the time licensure was  
4 enacted, that was my home office or home  
5 base of operation.

6 Q. And then why did you become  
7 licensed in New York?

8 A. When I joined CBIZ Valuation in  
9 again I think it was 2002, my practice  
10 expanded on a national or much more  
11 regional basis and I believe that's the  
12 reason why I became licensed in New York.

13 Q. Are you licensed or certified in  
14 any other states?

15 A. Yes.

16 Q. Where?

17 A. I'm currently certified in  
18 New Jersey, New York, Pennsylvania and  
19 Florida.

20 Q. Okay. And you've been a licensed  
21 real estate broker in New Jersey for the  
22 past 43 years; right?

23 A. Yes.

24 Q. Have you ever been a licensed  
25 real estate broker in New York?

1 HEDDEN

2 A. No.

3 Q. And why do you hold that license  
4 in New Jersey but not in New York?

5 A. Because the practice of being a  
6 real estate broker has never required me  
7 to get a license in New York.

8 Q. What is the Appraisal Institute?

9 A. The Appraisal Institute is a  
10 professional organization that promotes  
11 real estate appraisal through its  
12 education and certification of real estate  
13 appraisers.

14 Q. When did you become a member of  
15 the Appraisal Institute?

16 A. By member, I received my MAI  
17 member -- well, the MAI designation, I  
18 believe in 1985. That's my best  
19 recollection. Prior to that, I had joined  
20 the chapter of the Appraisal Institute as  
21 a associate member, if you will, prior to  
22 receiving my designation as far back as  
23 1978.

24 Q. Now, when you become an MAI  
25 appraiser, is that associated with a

1 HEDDEN

2 specific state or is it just you're a  
3 member of the Appraisal Institute, period?

4 A. Member of the Appraisal  
5 Institute, period.

6 Q. Have you ever held any positions  
7 with the Appraisal Institute?

8 A. Yes.

9 Q. What positions have you held?

10 A. I was the chapter president in  
11 New Jersey. I was again a board member in  
12 the New Jersey chapter. On a national  
13 level, I have been on project teams  
14 relative to valuation of -- or valuation  
15 for financial reporting, and I am a  
16 licensed instructor for the Appraisal  
17 Institute or certified appraiser for the  
18 Appraisal Institute, and I'm trying to  
19 think if there's other -- most of it is in  
20 my CV that is attached to my report so  
21 that basically from a summary is the roles  
22 that I've played within the Appraisal  
23 Institute.

24 Q. You mentioned that you're a  
25 licensed instructor for the Appraisal

1 HEDDEN

2 Institute. What courses have you taught  
3 for the Appraisal Institute?

4 A. Again I'm certified. There's no  
5 licensing. I'm certified to teach for the  
6 Appraisal Institute. I currently teach  
7 appraisal -- excuse me, highest and best  
8 use in market analysis both on a general  
9 and advanced basis. Those are two  
10 different courses. I am certified to  
11 teach statistics and -- a statistics  
12 course, an entry level statistics course.  
13 I have taught international income  
14 capitalization approach and I have taught  
15 in my past all the capitalization courses  
16 that the Appraisal Institute had offered  
17 in their early stages, plus I've taught a  
18 couple of seminars but I can't recall all  
19 of them. It's been a long process of my  
20 tenure in the teaching for the Appraisal  
21 Institute.

22 Q. Understood. So when was the last  
23 time you taught a market analysis and  
24 highest and best use class?

25 A. I think it was just before COVID

1 HEDDEN

2 I taught in New York City, the New York  
3 chapter, so it would have to have been I  
4 think 2019.

5 Q. Was that the advanced class or  
6 the basic class?

7 A. That was the basic class. They  
8 called it general. It's called a general  
9 highest and best use.

10 Q. When was the last time you taught  
11 the advanced class?

12 A. It had to have been maybe 2017 or  
13 '18. That's my best recollection.

14 Q. Okay. So you mentioned that  
15 your -- you're affiliated with the  
16 New Jersey chapter of the Appraisal  
17 Institute. What are the rough geographic  
18 boundaries of that chapter?

19 A. I would say the New York -- it's  
20 in New Jersey but it's the northern  
21 portion of New Jersey. They have chapter  
22 members all over the state but I would say  
23 as far south as say Mercer County and  
24 Middlesex County to the northern boundary  
25 with New York and Pennsylvania.

1 HEDDEN

2 Q. Does it include any of the  
3 boroughs of New York City?

4 A. No, it does not.

5 Q. Okay. And why did you affiliate  
6 with the New Jersey chapter of the  
7 Appraisal Institute?

8 A. Well, my early career, and again  
9 when I started as a real estate broker,  
10 that was the chapter. I was known as  
11 chapter number 1 and that is when I became  
12 affiliated with that chapter and I then  
13 increased my chapter membership to include  
14 the metropolitan New York chapter as well  
15 because of my involvement in the city so I  
16 was a dual member in both New York and  
17 New Jersey.

18 Q. And when did you do that?

19 A. It's been many years as I began  
20 to work in New York and teach in New York,  
21 but I don't exactly know when I became a  
22 dual member.

23 Q. About how many times have you  
24 been qualified by a court to testify as an  
25 expert in appraisals?

1 HEDDEN

2 A. I'm going to say 20, 25 times at  
3 least.

4 Q. Ever in the state or federal  
5 courts in New York?

6 A. Yes. I have been qualified in  
7 the Southern District, in federal court.  
8 And if you can repeat the question again,  
9 I got a little distracted so please  
10 repeat.

11 Q. I was just curious if you'd ever  
12 been qualified as an expert in the state  
13 or federal courts in New York?

14 A. Early on in my career, I was  
15 Supreme Court of New York up in I think it  
16 was Westchester County. We just talked  
17 about the Southern District, and then I  
18 have appeared at the bankruptcy court in  
19 Brooklyn, but again it's been many years  
20 but those are my best recollections but in  
21 my CV we identify the Southern District  
22 testimony.

23 Q. I'm hearing some feedback here.

24 Were any of those -- did any of  
25 those assignments involve fair market rent

1 HEDDEN

2 valuations?

3 A. No.

4 Q. Have you ever served as an expert  
5 in a case involving a fair market rent  
6 valuation?

7 A. Yes.

8 Q. Okay. Can you describe -- I  
9 guess how many times?

10 A. In terms of my appearance as an  
11 expert in the determination or opinion as  
12 to a ground lease opinion of rental, just  
13 one time.

14 Q. Okay. And where was that, was  
15 that the Miami case we talked about  
16 earlier?

17 A. No, that was in Trenton federal  
18 court.

19 Q. Do you recall the name of that  
20 case?

21 A. I believe the name of the case  
22 was Textron, T-E-X-T-R-O-N, Textron.

23 Q. How about in arbitrations, have  
24 you ever served as an expert in  
25 arbitration?



1 HEDDEN

2 A. No.

3 Q. Do you know if a court has ever  
4 excluded or rejected any proposed expert  
5 testimony by you?

6 A. Can we go back to the prior  
7 question when you said arbitration? Yes,  
8 I have appeared in arbitration in divorce  
9 matters in the City of Philadelphia so to  
10 make the record clear, arbitration or  
11 mediation, between in matrimonial matters.  
12 In your second question then with regards  
13 to, no, my testimony has never been  
14 barred, I've never been disqualified.

15 Q. Over the past 10 years or so,  
16 approximately how much of your work  
17 involves matters that require testimony in  
18 some form?

19 A. Over the last 10 years, was that  
20 the question?

21 Q. Yeah, just roughly. I'm not  
22 looking for an exact number.

23 A. I would have to say 60 to 70  
24 percent of my work has been involved in  
25 that capacity.

1 HEDDEN

2 Q. And what did the other 30 to 40  
3 percent of your work involve?

4 A. Would have been valuation.

5 Q. So just you serving as an  
6 appraiser?

7 A. Yes.

8 Q. And we may have briefly touched  
9 on this earlier but have you ever served  
10 as a neutral or party appraiser for a fair  
11 market rent determination before?

12 A. No.

13 Q. Are you familiar with the  
14 New York Court of Appeals decisions in  
15 936 Second Avenue LP versus Second  
16 Corporate Development, it's a 2008  
17 decision and the 1996 decision in New York  
18 Overnight Partners LP v. Gordon?

19 A. I have become familiar with those  
20 cases.

21 Q. What is your understanding of  
22 those cases and the rules announced to  
23 them?

24 MR. KOH: Objection. You may  
25 answer.

1 HEDDEN

2 THE WITNESS: Well, I think again  
3 my -- that's a legal interpretation of  
4 what the cases mean. As an appraiser  
5 I read them and I generally take away  
6 the themes, if you will, of those  
7 cases and as instructive to an  
8 appraisal guideline in the valuation  
9 of ground leases.

10 BY MR. WALSH:

11 Q. So just generally, what is your  
12 understanding of what those cases require  
13 of an appraiser?

14 MR. KOH: Same objection. Go  
15 ahead and answer.

16 THE WITNESS: Well, I think the  
17 key takeaways would be to the extent  
18 the language in the lease does not  
19 specifically address the issue of  
20 encumbrance of the lease in the reset,  
21 so to speak, that a lease should be  
22 considered in the valuation going  
23 forward as encumbered, if it's not  
24 mentioned as specifically one way or  
25 the other, then it is to be considered

1 HEDDEN

2 in the analysis.

3 BY MR. WALSH:

4 Q. Have you ever needed to apply  
5 that rule in one of the appraisals that  
6 you've been involved in?

7 A. No.

8 Q. Okay. So you've never been  
9 involved in an appraisal or appraisal  
10 assignment that involved that rule?

11 A. That's correct.

12 Q. Do you recall when you first  
13 learned of this rule?

14 A. I think just generally reading  
15 appraisal literature as in the cases that  
16 were cited in my expert report that were  
17 in the appraisal journal, and having read  
18 the materials that are involved in this  
19 case.

20 Q. Okay. And you're now currently  
21 employed by Integra Realty Resources in  
22 Philadelphia; correct?

23 A. Yes.

24 Q. And you started there in June of  
25 2021; right?

1 HEDDEN

2 A. Yes.

3 Q. And you're based in their  
4 Philadelphia office; right?

5 A. Correct.

6 Q. What types of projects have you  
7 worked on at IRR since you joined them in  
8 June of 2021?

9 A. Valuation of properties  
10 throughout southern New Jersey and  
11 Philadelphia, general Philadelphia region,  
12 and have been retained, but currently not  
13 working on some projects in New York, and  
14 the bulk of it, 90 percent of it, has been  
15 in valuation for bank mortgages, and some  
16 general litigation involved in the general  
17 Philadelphia region.

18 Q. Okay. You mentioned --

19 A. The work, bear with me, has been  
20 significant in the valuation of  
21 quick-serve restaurants and ground leases  
22 for various mortgage or estate tax  
23 purposes.

24 Q. Let's talk about that last part  
25 about your work for valuation of

1 HEDDEN

2 quick-service restaurants. Can you just  
3 describe in a little bit more detail what  
4 that work involves, what type of  
5 quick-service restaurants, what you were  
6 engaged to do?

7 A. Yes, it's been for mortgage  
8 purposes to value the triple net ground  
9 leases attendant to I can think of a  
10 Wendy's, McDonald's, I have to think of  
11 some of the other restaurants that were  
12 underlying some of these leases. And  
13 that's generally been the valuation, scope  
14 of work that's been involved again for  
15 financing purposes and then a large  
16 portfolio that just came through with  
17 ground leases for an estate tax  
18 assignment. And so that's in general what  
19 my involvement has been with Integra in  
20 the last, say, six, seven months.

21 Q. For the matters in New York that  
22 you referenced you're working on, where  
23 are those properties located?

24 A. It's kind of confidential. I'll  
25 generally speak because they are currently

1 HEDDEN

2 being litigated. One is in Astoria and I  
3 have another case that's currently still  
4 pending in Manhattan.

5 Q. Astoria in Queens?

6 A. Yes.

7 Q. And before you joined the IRR,  
8 you worked at Houlihan Lokey; right?

9 A. Yes.

10 Q. And you were in their dispute  
11 resolution and consulting practice; right?

12 A. That's correct.

13 Q. You joined there in October 2017?

14 A. Yes.

15 Q. Where was your office when you  
16 worked at Houlihan?

17 A. Park Avenue between 46th and  
18 47th.

19 Q. And approximately what percentage  
20 of your work was for litigation support or  
21 expert testimony services when you were at  
22 Houlihan?

23 A. About a hundred percent.

24 Q. Of that work at Houlihan, what  
25 percentage related to properties located

1 HEDDEN

2 in New York?

3 A. Could be 50 percent.

4 Q. Okay. And of that -- of those  
5 New York cases, what percentage were in  
6 the outer boroughs of New York City,  
7 meaning the four boroughs other than  
8 Manhattan?

9 A. A very small portion, 10 percent,  
10 15 percent maybe.

11 Q. So it sounds like the vast  
12 majority of your New York work was for  
13 properties in Manhattan?

14 A. For the ones -- for the  
15 assignments that I had in New York, yes,  
16 Manhattan was the primary focus.

17 Q. Okay. And for the properties  
18 that were in the outer boroughs, what type  
19 of work did you do for those properties?

20 A. Type of work was a partnership --  
21 yeah, partnership dispute or dispute  
22 amongst various parties so that was the  
23 nature of the assignment.

24 Q. And so what specifically were you  
25 tasked with doing?



1 HEDDEN

2 A. There was a claim by one of the  
3 participants in this property at the 100  
4 Water Street in Brooklyn relative to their  
5 entitlement to certain cash flows flowing  
6 from that development, and that was my  
7 involvement, to counsel the owner of the  
8 property as to what this other third-party  
9 was entitled to.

10 Q. Okay. Did any of the matters in  
11 the outer boroughs when you were at  
12 Houlihan involve valuation of vacant  
13 properties or properties assumed to be  
14 vacant?

15 A. Not that I recall, no.

16 Q. Okay. And before you joined  
17 Houlihan, you worked at FTI Consulting in  
18 FTI's real estate solutions practice  
19 group; right?

20 A. Yes.

21 Q. And you joined them in around  
22 November of 2010?

23 A. Might have been 2012. I think it  
24 was only a five year, from 2012 to 2017.

25 Q. Okay. And you were in --

1 HEDDEN

2 headquartered in their New York office?

3 A. Yes.

4 Q. What type of work did you do at  
5 FTI?

6 A. Primarily litigation support with  
7 some other valuation and consulting  
8 assignments.

9 Q. Approximately what percentage of  
10 your work was for litigation support or  
11 expert testimony at FTI?

12 A. Probably 50 percent, 50, 60  
13 percent.

14 Q. And how about the remaining 40 to  
15 50 percent?

16 A. Well, it could have involved  
17 valuation for -- again, I have to think  
18 for a second. Public offerings, companies  
19 that were going to go public. It could  
20 have involved valuation for like I say  
21 financial reporting. It could have  
22 involved -- I'm just trying to think,  
23 non-litigation case, right. And then  
24 there would be restructuring or bankruptcy  
25 work. So those are -- again because they

1 HEDDEN

2 range on valuation in the litigation  
3 context, it's kind of fuzzy between the  
4 work that I did, whether it was litigation  
5 or whether it was just straight valuation.

6 Q. Understood. So of the -- of your  
7 work at FTI, roughly what percent involved  
8 properties in New York?

9 A. Much more significant than it was  
10 at Houlihan. Percentage wise it probably  
11 was of the work, 30 to 40 percent of the  
12 work was in New York, you know, Manhattan  
13 or the boroughs.

14 Q. Okay. And of that 30 to 40  
15 percent that was in New York, what  
16 percentage of that New York involved  
17 properties in Manhattan?

18 A. Probably 20 percent, 25 percent.

19 Q. And where was the other 75 to 80  
20 percent?

21 A. It could have been in -- again  
22 there was some work in Brooklyn, some work  
23 in Staten Island. I'm trying to think.  
24 And again, we're going over numbers and  
25 percentages so it's all starting to run

1 HEDDEN

2 together here. So there was a signifi --  
3 and the rest of it probably was in  
4 Manhattan, some out in Queens and out on  
5 the island, Long Island. So that's the  
6 best of my recollection as we stand here  
7 today.

8 Q. So at FTI were you ever involved  
9 in any matters that involved valuing  
10 vacant land or property assumed to be  
11 vacant in one of the outer boroughs?

12 A. Yes, I believe there was a case,  
13 yeah.

14 Q. And what did that matter involve?

15 A. When you say boroughs, something  
16 was out in Rockaway where I was  
17 representing a neighboring property owner  
18 that had their property contaminated and  
19 the neighboring property was -- had a  
20 vacant track that they were trying to  
21 develop so it involved environmentally  
22 contaminated property that was vacant  
23 hoping to be developed out in Rockaway is  
24 the one case that comes to mind right away  
25 but I'm sure there might be others but I

1 HEDDEN

2 don't recall at this time.

3 Q. Okay. And how about any fair  
4 market rent valuations when you were at  
5 FTI in the outer boroughs?

6 A. None that I recall.

7 Q. Okay, so we've gone back about a  
8 dozen years or so. I know you mentioned  
9 before I think that you were at American  
10 Appraisal and CBIZ, that's C-B-I-Z,  
11 Valuation Group. So over the course of  
12 the past 20 years or so, so going back to  
13 2002 which is when I believe you joined  
14 CBIZ, can you recall any other projects  
15 that we haven't already talked about that  
16 involve fair market rent evaluations for  
17 property located in the outer boroughs?

18 A. No, specifically to the outer  
19 boroughs, no.

20 Q. And again over the course of the  
21 past 20 years or so, approximately what  
22 percentage of your appraisal work related  
23 to properties located in the outer  
24 boroughs of New York?

25 A. 10 percent, and I'm coming up on

1 HEDDEN

2 my best estimate. You said over my career  
3 of almost 20 years in outer boroughs and  
4 all of the work that I have done, given  
5 the magnitude of the amount of work I've  
6 done, you know, I'm saying 10 percent.

7 Q. Okay, and how about in Brooklyn  
8 specifically?

9 A. To the extent we've just  
10 referenced the project at 100 Water, I did  
11 some advisory work for people in Brooklyn  
12 Heights on the recent zoning issues there,  
13 and then I'm trying to think of some other  
14 work that we've done in the outer boroughs  
15 as you've requested. And then in Long  
16 Island City, some work there. I would  
17 have to say that probably is the extent of  
18 the valuation assignments I've done in the  
19 outer boroughs in the last I'll say three  
20 to eight, say 10 years.

21 Q. I was asking you to go back even  
22 further. I'm wondering in the past, say,  
23 20 years what matters do you recall in  
24 Brooklyn that we haven't discussed?

25 A. So if we go back into the CBIZ

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years, there was a project I worked on on behalf of the LeFrak family on behalf of the co-op and apartment conversion they were doing in Brooklyn. That's one that comes to me when I was at CBIZ. So that goes back again to that extra 10-year increment. And again there might be an odd property here or there but those are the ones that I can recall at this moment.

Q. Okay. When was the first time you were contacted for performing work for the property located at 840 Atlantic Avenue in Brooklyn?

A. I believe it was in October, late September, October. Again I did not review my engagement letter before we talked today, I didn't look at it but I think that that was in 2021 so it was maybe a month or two before I rendered that report, my expert report.

Q. Okay. And who contacted you?

A. I was contacted by Howard Koh.

Q. Have you ever worked with Mr. Koh before?

1 HEDDEN

2 A. No.

3 Q. What facts or information about  
4 the matter did Mr. Koh share with you  
5 during your initial conversations before  
6 you were engaged?

7 A. That there was an issue regarding  
8 a ground lease reset beneath a McDonald's  
9 at the property in question, 840 Atlantic  
10 Avenue, and that there was an appraisal  
11 that was prepared by Mr. Tener from KTR  
12 regarding a ground rent reset and asked if  
13 I would be willing to participate as  
14 reviewing appraiser to look at the  
15 document, look at again all the other  
16 production in this case and prepare an  
17 expert report as you see here that I have  
18 submitted in this matter.

19 Q. Were you familiar with this  
20 specific property at 840 Atlantic Avenue  
21 in Brooklyn before you became involved in  
22 this matter?

23 A. No.

24 Q. Have you ever spoken with Sam  
25 Rottenberg about this matter?



1 HEDDEN

2 A. No.

3 Q. Have you ever spoken with Sam  
4 Rottenberg about any matter?

5 A. No.

6 Q. How about Tom Li?

7 A. No.

8 Q. Have you ever worked with the  
9 attorneys at the law firm of Meister  
10 Seelig & Fein before this matter?

11 A. Yes.

12 Q. Who have you worked with?

13 A. Mr. Missry.

14 Q. Oh, so you mean Morris Missry?

15 A. Yes.

16 Q. Okay. I was actually asking you  
17 about attorneys at Mr. Koh's firm, Meister  
18 Seelig & Fein?

19 A. Then I should pay attention to  
20 the question. No, no other attorneys at  
21 the Meister firm.

22 Q. So how often or how many times  
23 have you worked with Morris Missry then?

24 A. Oh, I just -- one other time.

25 Q. What did that matter involve?

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2 A. When I worked at FTI, I was --  
3 did an appraisal assignment on behalf of a  
4 property owner for properties in the  
5 garment district, and there was a dispute  
6 as to a partnership agreement and so my  
7 role was to value the property under that  
8 scenario.

9 Q. What type of dispute was it?

10 A. I think it had to do with a  
11 fractional interest. There was a partial  
12 ownership interest and there was a dispute  
13 as to what the partner's share was worth  
14 and whether it was proportionate or  
15 whether it was subject to a marketability  
16 discount or lack of -- you know, a DLOM,  
17 right, discount for lack of marketability.

18 Q. I see. Have you ever spoken with  
19 Simon Dushinsky before?

20 A. No.

21 Q. Have you ever worked with anyone  
22 at the Rabsky Group before?

23 A. No.

24 Q. Did Meister Seelig tell you to  
25 make any assumptions that you relied on in

1 HEDDEN

2 forming your opinions in this matter?

3 A. No.

4 MR. WALSH: Okay. Chelsea, if we  
5 could please mark as P103 the expert  
6 report of Michael P. Hedden.

7 VERITEXT CONCIERGE: Yes, one  
8 moment, please.

9 (Exhibit P103, expert report of  
10 Michael P. Hedden, marked for  
11 identification.)

12 THE WITNESS: While she's putting  
13 that up, I'm pretty regimented about  
14 my lunch hour, so 12:30 if we can go,  
15 I'm just giving you the heads up,  
16 we'll go to another half an hour and  
17 then I'll ask for a break.

18 MR. WALSH: That's totally fine.

19 MR. KOH: Exhibit P 103 has been  
20 introduced. Please refresh in Exhibit  
21 Share.

22 BY MR. WALSH:

23 Q. Okay, Mr. Hedden, if you can tell  
24 me when you've had a chance to pull that  
25 up.

1 HEDDEN

2 A. Okay, I see the pdf and I'll  
3 click on it, and it is opening. Okay, it  
4 is in front of me.

5 Q. And this is the expert report  
6 dated November 12, 2021 that you issued in  
7 this matter; right?

8 A. Yes.

9 Q. If you could turn to the back,  
10 it's the page after your signature page so  
11 I guess it's about page 20. It's section  
12 VII and it's captioned Information  
13 Considered In Forming The Opinions.

14 A. I see that in front of me.

15 Q. Okay. There are 18 documents or  
16 categories of documents listed in there.  
17 Is this the full universe of information  
18 that you considered in forming your  
19 opinions in this matter?

20 A. This is the information that I  
21 considered in addition to the publications  
22 and treatise which are contained in  
23 section 8 so I would say that this coupled  
24 with that section and then again, my  
25 experience over 40 years were used in the

1 HEDDEN

2 formation of my opinion.

3 Q. Right, but I guess section VII  
4 contains all of the documents that are  
5 relevant to this specific matter that you  
6 reviewed?

7 A. Yes.

8 Q. And since you issued your report  
9 on November 12, have you reviewed or  
10 considered any additional documents  
11 relating to this matter that are not  
12 listed on here?

13 A. Not that were used in the basis  
14 of my opinion that is shown in this expert  
15 report, no.

16 Q. Have you reviewed any other  
17 documents relevant to this property that  
18 are not listed on this section VII?

19 A. Yes.

20 Q. What documents?

21 A. I believe I was provided the  
22 expert report that was prepared on behalf  
23 of McDonald's and the review of  
24 Mr. Tener's report.

25 Q. So that was the expert report of

1 HEDDEN

2 Amanda Aaron?

3 A. Yes.

4 Q. Now, your list includes seven  
5 deposition transcripts. Did you review  
6 all seven deposition transcripts in their  
7 entirety?

8 A. Yes, I opened each one of them  
9 and reviewed them, yes.

10 Q. So let's start with the first one  
11 on the list, Mr. Tener's deposition.

12 When did you review that?

13 A. Prior to my rendering -- prior to  
14 issuing the report.

15 Q. And how long do you recall  
16 roughly spending reading that transcript?

17 A. Given the size of it, I think it  
18 probably took me, I'm going to do my best  
19 recollection, probably took me four hours,  
20 five hours.

21 Q. And when you were reviewing that  
22 transcript, were you also reviewing the  
23 exhibits that were shown to Mr. Tener  
24 during his deposition?

25 A. Yes.

1 HEDDEN

2 Q. And how about for Sam Rottenberg,  
3 did you -- you reviewed his transcript in  
4 its entirety?

5 A. Yes.

6 Q. What testimony stood out to you  
7 as relevant in Mr. Rottenberg's  
8 transcript? And when I say relevant,  
9 relevant to your analysis.

10 A. I think the things that stood out  
11 from his deposition transcript really had  
12 very little to do with my expert report  
13 given the scope of what I was asked to do.  
14 So other than we could discuss what it  
15 said and what you could glean from that  
16 document, very little, if anything, had to  
17 do with the expert report that I've  
18 rendered in this case or my opinions in  
19 this case.

20 Q. Okay. Do you remember any  
21 relevant information that you learned for  
22 purposes of rendering your opinion from  
23 Mr. Rottenberg's deposition transcript?

24 A. As this deposition progresses if  
25 there are certain questions you ask me

1 HEDDEN

2 relative to information that may have been  
3 discussed by Mr. Rottenberg, I am aware of  
4 those but there's nothing relevant in  
5 Rottenberg's testimony that went into my  
6 formulating my opinion regarding the  
7 credibility of Mr. Tener's report.

8 Q. Okay. Same question for the  
9 transcript of the deposition of Michael  
10 Meyer.

11 A. I don't remember anything in  
12 Mr. Meyer's testimony that was relevant in  
13 my opinion and that's contained in my  
14 expert report.

15 Q. Okay. How about for the  
16 deposition transcript of Tom Li, do you  
17 remember any relevant information you  
18 learned for purposes of rendering your  
19 opinion in this matter?

20 A. No, I don't really recall  
21 Mr. Li's deposition.

22 Q. How about Carol Demarco?

23 A. Again, not as it relates to my  
24 opinions in this matter, no, there's  
25 nothing relevant in her testimony that I



1 HEDDEN

2 can say influenced my opinion.

3 Q. How about Sharon Locatell's  
4 deposition?

5 A. No, I can say other than  
6 understanding Ms. Locatell's position in  
7 this case, again my opinion deals with the  
8 credibility of Mr. Tener's report and  
9 there's nothing in what I did and the  
10 opinions that I've reached that are  
11 overshadowed by any of the deposition  
12 testimony from Mrs. Locatell.

13 Q. Okay. And so to be clear, you're  
14 not rendering any opinions on Sharon  
15 Locatell's reports; is that right?

16 A. No, I have not been asked to  
17 render any of those opinions in this  
18 report. It's basically those that are  
19 contained in my expert report that we have  
20 on the screen here.

21 Q. By the way, have you ever  
22 reviewed any of Sharon Locatell's reports  
23 issued for 840 Atlantic Avenue?

24 A. If her report was in the  
25 exhibits, then I would have seen it but I

1 HEDDEN

2 think your question when did I read it and  
3 the answer would be no, I don't recall  
4 reading other than scanning through a few  
5 pages maybe.

6 Q. Do you recall the fair market  
7 rental value conclusion that Sharon  
8 Locatell reached in her analysis?

9 A. Vaguely.

10 Q. What do you recall about that?

11 A. I believe it was -- it had  
12 300,000 as the first digit and it wasn't  
13 400,000. My best recollection it was more  
14 than 300,000 and less than 400,000 is the  
15 best I recall without seeing it.

16 Q. And do you recall what value  
17 Mr. Tener reached when he valued the same  
18 property?

19 A. Can you please show me the report  
20 so I don't misspeak?

21 MR. WALSH: Sure, Chelsea, it's  
22 been previously marked as P36.

23 VERITEXT CONCIERGE: And you  
24 would like to keep that marking as  
25 P36?

1 HEDDEN

2 MR. WALSH: Yes, please.

3 VERITEXT CONCIERGE: One moment.

4 MR. WALSH: And I'm just -- never  
5 mind.

6 VERITEXT CONCIERGE: Exhibit P36  
7 has been introduced. Please refresh.

8 BY MR. WALSH:

9 Q. Mr. Hedden, P36 is KTR's July 30,  
10 2019 report regarding 840 Atlantic Avenue  
11 in Brooklyn and it's signed by both Tom  
12 Tener and Shaun Kest.

13 A. Yeah, I've got it. It's coming  
14 up on the screen now. The conclusion  
15 reached by Mr. Tener as shown by page 4 of  
16 his report indicates a fair market rental  
17 value of \$1,078,400 per year.

18 Q. Okay.

19 And that's roughly a million  
20 dollars more per year than Sharon  
21 Locatell's value; right?

22 A. Again, I have not authoritatively  
23 spoken to what Sharon Locatell's value is  
24 but if that's your representation to me,  
25 then it is what it is.

1 HEDDEN

2 Q. Well, you said you recall it  
3 having a -- somewhere between 3- and  
4 400,000; right?

5 A. Let's pull up Sharon Locatell's  
6 report on the screen and I'll be able to  
7 give an exact difference.

8 Q. So I don't think that's necessary  
9 but I'm just -- your recollection was that  
10 it was between 3- and 400,000, right, for  
11 Sharon Locatell?

12 A. Yes, that's my recollection  
13 without looking at the report and my  
14 memory.

15 Q. And your understanding was that  
16 she was valuing exactly the same thing  
17 that Mr. Tener had been asked to value;  
18 correct?

19 A. No.

20 Q. You think they were doing  
21 different -- they were tasked with  
22 different assignments?

23 A. Your question was vague, you said  
24 the same thing, so no, they had the same  
25 assignment generally speaking, yes.

1 HEDDEN

2 Q. And you didn't think it was -- it  
3 would be helpful or relevant to read her  
4 report even though she arrived at a  
5 valuation of roughly a million dollars  
6 lower per year than Mr. Tener?

7 MR. KOH: Objection. You may  
8 answer.

9 THE WITNESS: No.

10 BY MR. WALSH:

11 Q. Why not?

12 A. My assignment and the scope of my  
13 work went to determining or again reaching  
14 an opinion as to the credibility or  
15 whether Mr. Tener's report was worthy of  
16 belief based on the report that he has  
17 prepared and the work papers that were  
18 provided and his testimony in deposition  
19 and whether or not there was a compliance  
20 with USPAP and whether or not his work was  
21 consistent with the addendum to the lease  
22 relative to the process of the rent reset  
23 for this property. It did not include  
24 comparing or looking at Ms. Locatell's  
25 report.

1 HEDDEN

2 Q. Well, wouldn't the report of  
3 another MAI appraiser who was given the  
4 same assignment as Mr. Tener, wouldn't  
5 that be relevant in evaluating credibility  
6 and reasonableness and reliability of  
7 Mr. Tener's report?

8 A. No.

9 Q. Why is that?

10 A. Appraisers will differ.  
11 Appraisals are opinions. Mr. Tener has  
12 his opinion, Ms. Locatell has hers. I'm  
13 not interested in Mrs. Locatell's opinion.  
14 I'm interested in Mr. Tener's opinion and  
15 whether within the four corners of his  
16 report, coupled with his testimony and his  
17 work papers produced a credible opinion  
18 that was worthy of belief and not to think  
19 about or not to be involved with  
20 Ms. Locatell's opinion because appraisers  
21 are free to have their own opinion and  
22 based on the review that I've conducted,  
23 the process was -- that was laid out in  
24 the addendum was followed, USPAP was  
25 followed and therefore I didn't need to

1 HEDDEN

2 consider any other information.

3 Q. And you can't imagine any  
4 information that may have been included in  
5 Ms. Locatell's report that would have  
6 impacted your opinion on the reliability,  
7 credibility and reasonableness of  
8 Mr. Tener's opinion?

9 MR. KOH: Objection. Go ahead  
10 and answer.

11 THE WITNESS: Given the magnitude  
12 of the differential between the two  
13 appraisers, when this occurs,  
14 oftentimes it is as a result of a  
15 highest and best use conclusion that  
16 causes the information to go as vastly  
17 wide as it has, and that's why when  
18 the lease called for a differential of  
19 more than 15 percent, that a  
20 third-party appraiser would be called  
21 in to reconcile the two opinions.

22 BY MR. WALSH:

23 Q. Especially given the magnitude of  
24 the differential between the two  
25 appraisers, wouldn't it have been helpful

1 HEDDEN

2 in your valuation of Mr. Tener's report  
3 and opinions to understand what  
4 information Ms. Locatell considered in  
5 reaching a very different conclusion as to  
6 value than Mr. Tener?

7 MR. KOH: Objection. You may  
8 answer.

9 THE WITNESS: When I said I  
10 briefly looked at Ms. Locatell's  
11 report, I specifically looked at her  
12 conclusion of highest and best use and  
13 as I just testified, oftentimes when  
14 there's such a varity or wide spread  
15 between the two opinions, it rests in  
16 highest and best use. So therefore,  
17 once I understood where Ms. Locatell  
18 was coming from in terms of highest  
19 and best use, I understood why the  
20 difference.

21 BY MR. WALSH:

22 Q. And that's where you stopped?

23 A. Yes.

24 Q. Okay. How about the deposition  
25 of Morris Missry, what, if any, relevant



1 HEDDEN

2 information did you learn from your review  
3 of that deposition transcript?

4 A. My best recollection, and I don't  
5 recall exactly but I think that whether it  
6 was an e-mail or in the testimony, my best  
7 recollection of Mr. Missry's position on  
8 this was that the cases -- the case law  
9 that you previously cited, he did not  
10 necessarily agree with as applicable in  
11 the subject case. So that's the key  
12 takeaway from Mr. Missry's position or his  
13 deposition, had he elaborated on that  
14 position in the deposition, I can't recall  
15 specifically, but the key aspect of what  
16 he may have said there would have been his  
17 interpretation of the subject lease and as  
18 it related to the case law of those cases  
19 that you previously cited in earlier  
20 testimony.

21 Q. Okay. So your recollection --  
22 I'm sorry, I'm hearing a lot of feedback  
23 on my end.

24 Your recollection is that there  
25 was I guess a disagreement about the

1 HEDDEN

2 applicability of, say, the 936 Second  
3 Avenue case; is that right?

4 A. I'm not sure that you've  
5 characterized, you said in your question  
6 he just took a legal position and from he  
7 said, he didn't think it was applicable.  
8 There was no conflict, per se, other than  
9 the fact that as he's a legal guy, he's a  
10 lawyer, he knows and he's very  
11 knowledgeable about real estate matters,  
12 so that's his opinion.

13 Q. And so that's an opinion as to  
14 whether the 20-year encumbrance of the  
15 McDonald's lease needed to be considered  
16 in the valuation; is that right?

17 A. In a nutshell, yes, that's the  
18 key concept that he objected to.

19 Q. And would that be an important  
20 fact for an appraiser to understand when  
21 performing a valuation?

22 A. Yes.

23 Q. Why is that?

24 A. In these types of situations,  
25 that is an area of interpretation and so

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to the extent that it's his position that it is not applicable or does not apply, is relevant to the extent that that's his position and he's advising his client. So in that regard, I think that's -- you take it for what it's worth and as the appraiser, you follow the guidelines that have been set forth by precedent and you move forward. But he's entitled to his legal interpretation.

Q. So why would it have been important for Mr. Tener to know whether or not the 20-year encumbrance of the lease needed to be considered in his valuation?

A. I think it would have been important going forward because given his role as the -- one of the appraisers on behalf of the landlord, and knowing that it was very possible that there was going to be a third-party review, had him and Ms. Locatell not reached a consensus as to the value, that he would know that another MAI so qualified as himself or a peer would also factor that in. So he would

1 HEDDEN

2 have been remiss had he not walked through  
3 the exercise.

4 Q. So would the existence of the  
5 20-year encumbrance of the lease impact  
6 the valuation of the property?

7 A. I believe that the consideration  
8 of the 20-year encumbrance does impact the  
9 value of the property.

10 Q. So understanding whether or not  
11 the encumbrance of the lease needed to be  
12 considered was necessary for Mr. Tener to  
13 determine how to value the property;  
14 right?

15 A. No, it was one of various tools  
16 that he could use following the  
17 instructions of the lease in arriving at  
18 his opinion but it was one of the things  
19 he should have -- and he did consider.

20 Q. Okay. So we'll address that a  
21 little bit further later on.

22 Moving back to section VII of  
23 your report, P103, bullet 3 says  
24 McDonald's exhibit production, Exhibits P1  
25 through P102. You've already testified

1 HEDDEN

2 that you did not fully read Ms. Locatelli's  
3 reports. What documents did you review in  
4 their entirety that were within this P1  
5 through P102 range?

6 A. I scrolled through them. I mean  
7 there's a lot of them and so I sat with  
8 the computer and scrolled through each one  
9 of them just to, one, say that I looked at  
10 them and anything that was relevant I read  
11 and looked at.

12 Q. Which of the documents do you  
13 recall being especially relevant aside  
14 from Mr. Tener's reports?

15 A. The list is pretty long so I  
16 don't want to go and say that these are  
17 only the ones. I think in the -- those  
18 things that might have been brought up in  
19 my report, expert report were then  
20 considered relevant in my analysis but  
21 generally speaking, I would have to say  
22 that other than I familiarized myself with  
23 the issues in this case, very few of them  
24 had anything really relevant impact on my  
25 position here and the opinions that I've

1 HEDDEN

2 reached in my expert report. So I can't  
3 as I stand here now and testify think  
4 about the 102 exhibits that were in that  
5 download.

6 Q. But if it was relevant, you would  
7 have referenced it somewhere else in your  
8 report; is that what your testimony is?

9 A. Yes.

10 Q. How about Vanderbilt's document  
11 production or exhibit production, A  
12 through Z and then AA through XX, do you  
13 recall which documents were especially  
14 relevant?

15 A. The only thing that I considered  
16 relevant in either one, and I don't know  
17 what bucket they were in, was the lease --  
18 or the information because it came up, it  
19 would have been the subsequent lease with  
20 Vanderbilt and the existing landlord, I'm  
21 going to mispronounce, Musto, and the  
22 structure of the organization that was put  
23 together as a result of the transfer of  
24 the asset so again without seeing them in  
25 front of me but those pieces of

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information I thought were relevant in hindsight to the understanding of that transfer of this property, and I'm sure that questions will come up about it later so I don't want to dismiss them here as we are in this area of questioning so those I think we will explore, and I'm assuming you're going to explore with me later, so therefore I want to point them out at this time. But other than those points of -- or those pieces of information, I don't think anything of significant relevance is contained therein.

Q. You said you thought they were relevant in hindsight. What do you mean by relevant in hindsight?

A. Well, I say relevant in hindsight because when I read the reports -- in rendering my opinion, that had nothing to do with my opinion of the credibility of Mr. Tener's report or his compliance with the addendum or his compliance with USPAP had nothing to do with that, other than the compliance with USPAP. And in USPAP

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there's a provision that talks about having knowledge about transactions that occurred three years prior and again, I don't have all the specifics in front of me at the moment but to the extent that Mr. Tener inquired but did not have available to him that transfer of information may or may not have reconciled it with the information that he had when he prepared his report, I looked at it and I found it somewhat relevant in defense of Mr. Tener not considering it or not including it and why it's not relevant in this case and therefore I highlight it at this time. But again, it doesn't go to Mr. Tener's credibility of his opinion but it does go to a possible issue on a USPAP like matter that goes to considering transactions involving the subject property. In that context that's my explanation.

MR. WALSH: So I think we will need to explore that a little bit later. It's 12:30 right now so you



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HEDDEN

requested a break. Happy to take one.  
How much time would you like?

THE WITNESS: I'm going to  
suggest 45 minutes.

MR. WALSH: That's fine by me.  
Cathi, does that work for you?

THE REPORTER: Yes, it's fine.

MR. KOH: We'll see everybody at  
1:15 then.

THE VIDEOGRAPHER: The time is  
12:31.

(Lunch recess taken at  
12:31 p.m.)

1 HEDDEN

2 A F T E R N O O N S E S S I O N

3 (Time noted: 1:19 p.m.)

4 M I C H A E L H E D D E N, resumed  
5 and testified as follows:

6 THE VIDEOGRAPHER: The time is  
7 1:19 p.m. We're back on the record.

8 CONTINUED EXAMINATION

9 BY MR. WALSH:

10 Q. Mr. Hedden, before we broke, we  
11 were talking about some of the documents  
12 that you reviewed and I want to just  
13 continue that discussion.

14 How much time did you spend  
15 reviewing the documents that are  
16 identified in section VII of your report?  
17 Approximately how much time total?

18 A. I'm going to have to say 25 hours  
19 maybe, 20, something like that.

20 Q. And then how much time did you  
21 spend preparing your report?

22 A. About the same. It was split  
23 50/50 so it was about 20 some hours in  
24 production of the document and 20 some  
25 hours reviewing information in number VII.

1 HEDDEN

2 Q. If we could refer to paragraph 23  
3 of your report which is P103.

4 A. Okay.

5 Q. You wrote, "As part of my  
6 analysis, I have conducted, one, a  
7 thorough review of the report and the  
8 exhibits produced in the appraiser's  
9 deposition and confirmed the  
10 calculations."

11 What do you mean "produced in the  
12 appraiser's deposition"?

13 A. We've identified Mr. Tener as the  
14 appraiser so there should be an apostrophe  
15 after that possessive and so it's the  
16 appraiser's deposition meaning Mr. Tener's  
17 deposition. So his report, the exhibits  
18 that were used in his deposition and the  
19 deposition testimony itself.

20 Q. Okay, now this paragraph does not  
21 discuss any review of any other exhibits  
22 other than Mr. Tener's -- the exhibits  
23 used in Mr. Tener's deposition and you  
24 said earlier that you sort of just you  
25 skimmed sort of the rest of them?

1 HEDDEN

2 A. Correct.

3 Q. Okay. Now paragraph 23 does not  
4 refer to KTR's work file and section VII  
5 of your report also does not reference  
6 KTR's work file. Did Vanderbilt provide  
7 you with KTR's complete work file for the  
8 July 30, 2019 report?

9 A. I do not know what would have  
10 been in the possession of Meister law firm  
11 relative to the complete work file. When  
12 I identified the report in this exhibit --  
13 excuse me, in my expert report, it was  
14 those work papers in the Excel  
15 spreadsheets that we've identified, and  
16 again I scrolled to this section so I  
17 can't identify specifically, but those  
18 Excel spreadsheets that were produced as  
19 exhibits showing his calculations and so  
20 any of that was considered as part of,  
21 quote, the Tener report because the report  
22 was only issued in a letter or restricted  
23 format and therefore my use of the word  
24 report here incorporates the written  
25 document itself that he produced plus the

1 HEDDEN

2 supporting information that was contained  
3 in what I call his work file.

4 Q. Okay. If you could pull up what  
5 has already been marked as P36, it's the  
6 July 2019 KTR report.

7 A. Is it in the Exhibit Share?

8 Q. Yeah, we looked at it earlier.

9 A. Okay.

10 Q. It's --

11 A. I'll go there. Let me just  
12 refresh. Hang on. Let's just see. And  
13 I'll get to the root file. My report was  
14 still here, hang on.

15 Still spooling. Hang on, let me  
16 try something else. P36, I'm there.

17 Q. The bottom of the first full  
18 page?

19 A. Yes.

20 Q. It ends with the Bates stamp  
21 1046.

22 A. I'm there.

23 Q. The very last sentence, it spills  
24 over on to the next page, it says, "The  
25 client is cautioned that the opinions and

1 HEDDEN

2 conclusions set forth in this restricted  
3 appraisal report may not be understood  
4 properly without additional information in  
5 the appraiser's work file."

6 Do you see that?

7 A. Yes.

8 Q. And Meister Seelig did not give  
9 you access to KTR's complete work file;  
10 right?

11 A. I don't know that to be true.

12 Q. Okay. But you only received the  
13 select documents that were used in  
14 Mr. Tener's deposition; right?

15 A. Yeah, they were produced in the  
16 deposition, the exhibits, that's correct.

17 Q. So what type of information is  
18 typically contained in an appraiser's work  
19 file?

20 A. Well, there could be notes --  
21 let's go back. It would be the engagement  
22 letter or retention letter, notes  
23 regarding the inspection of the property,  
24 other public information, again tax bills,  
25 so general information used in the

HEDDEN

1  
2 compilation of the report, both in terms  
3 of the description of the property and  
4 then the comparables used, the analysis  
5 and the ultimate conclusion. All of that  
6 usually is shown somewhere in the work  
7 papers, if it's not in the expert report,  
8 or the report in here, so it's those types  
9 of things that one finds in an appraiser's  
10 work file.

11 Q. Would there typically be some  
12 sort of note or information about the work  
13 that an appraiser did to search for comps?

14 A. No, not necessarily.

15 Q. Could it?

16 A. Well, again, you're saying  
17 description of the behavior used in the  
18 collection of the comparables. It would  
19 contain the comparables that were used in  
20 the analysis but it wouldn't necessarily  
21 describe our notes on what the activities  
22 were in collection of same.

23 Q. Do appraiser's work files  
24 sometimes contain information about steps  
25 the appraiser took to look for comps?

1 HEDDEN

2 A. Well, yeah, if there's different  
3 identities of comparables. In other  
4 words, the different sources one may have  
5 used, there would be threads of  
6 information relative maybe to what sources  
7 were used to locate comparables.

8 Q. Did you see any such information  
9 in the information that was provided to  
10 you?

11 A. I believe in the information that  
12 was provided to me were prior reports  
13 showing prior work relative to complete  
14 appraisal reports and then in the  
15 spreadsheets that were provided had  
16 details of other comparables that were  
17 considered in this analysis but weren't  
18 necessarily used.

19 Q. So Mr. Tener testified that he  
20 was not able to find any comparable leases  
21 to use in his analysis. Did you see  
22 anything in his work file demonstrating  
23 what Mr. Tener did to search for such  
24 comps?

25 A. No.



1 HEDDEN

2 Q. Do you know what he did to search  
3 for comparable leases?

4 A. Only that would have been  
5 described in his deposition testimony  
6 because I would have read it but I can't  
7 right now respond to your question because  
8 I can't recall exactly what he did in that  
9 endeavor.

10 Q. Okay. So you can't recall what  
11 he did to search for comparable leases?

12 A. I can't recall what he did to  
13 find comparable leases, that's correct.

14 Q. So if you were not sure if you  
15 received Mr. Tener's complete work file,  
16 how can you be certain that you fully  
17 understand the opinions and conclusions  
18 contained in his report?

19 A. Because I found the spreadsheets  
20 that were then supported by his deposition  
21 testimony as comprehensive enough so as to  
22 understand that Mr. Tener fulfilled the  
23 requirements under USPAP and the  
24 instructions in the addenda of the lease  
25 and found them convincing and credible

1 HEDDEN

2 enough to render the opinion that I did in  
3 my expert report.

4 Q. But if you did not review his  
5 complete work file, how can you be certain  
6 that analysis was complete?

7 MR. KOH: Objection. Go ahead  
8 and answer.

9 THE WITNESS: His analysis was  
10 complete enough for me to render the  
11 opinion that I did and therefore  
12 whether or not there might have been  
13 some other superfluous information  
14 that I was not privy to did not impair  
15 my ability to render the report that I  
16 did and reach the conclusion that  
17 Mr. Tener's report was credible.

18 BY MR. WALSH:

19 Q. How do you know that information  
20 that was not provided to you would have  
21 been superfluous?

22 A. Because I felt that based on my  
23 review of the information before me that  
24 was provided to me allowed me to have a  
25 level of professional certainty that

1 HEDDEN

2 is -- bear with me, I just got a  
3 connection issue.

4 To continue, so I had a level of  
5 certainty, professional certainty that the  
6 conclusion I reached and the information  
7 that was given to me was sufficient enough  
8 for me to render. Whether or not there  
9 was other information that was contained  
10 in the file, again, I described as  
11 superfluous because it wasn't germane to  
12 what I needed to opine the way I did in my  
13 expert report.

14 Q. Okay, so before we took a break  
15 earlier, you indicated that you learned  
16 perhaps some additional information about  
17 the Vanderbilt lease that you did not  
18 consider originally in preparing your  
19 expert report; isn't that right?

20 A. No, it's not correct.

21 Q. Okay. So is there any  
22 information that you've learned since you  
23 issued your expert report in November of  
24 2021 that you have found to be relevant  
25 that you did not consider to be relevant

1 HEDDEN

2 when you first issued your report?

3 A. Can you repeat the question? It  
4 was a little compound, it was a little  
5 confusing.

6 Q. Is there any information that you  
7 learned since you issued your report in  
8 November of 2021 that you have since found  
9 to be relevant that you did not consider  
10 to be relevant when you issued your  
11 report?

12 A. No.

13 Q. Did you ask for KTR's complete  
14 work file?

15 A. No.

16 Q. Why not?

17 A. I didn't think it was necessary  
18 based on the information that I had  
19 already in my possession.

20 Q. Notwithstanding the statement in  
21 KTR's report that the opinions and  
22 conclusions set forth in the restricted  
23 appraisal report may not be understood  
24 properly without additional information in  
25 the appraiser's work file?

1 HEDDEN

2 A. The information that I understood  
3 to mean in that writing was the Excel  
4 spreadsheets in addition to some of the  
5 other exhibits I did look at and therefore  
6 I considered that to be his work file.

7 Q. Did you confirm that  
8 understanding with anyone?

9 A. No.

10 Q. Did you author your report in its  
11 entirety?

12 A. Yes.

13 Q. Did you receive assistance from  
14 anyone?

15 A. No.

16 Q. Did you consult with anyone else  
17 in conducting your review and preparing  
18 your expert report?

19 A. No.

20 Q. Okay, if we could refer back to  
21 paragraph 23 of your expert report.  
22 Actually by the way, before we move on,  
23 you mentioned earlier that some other  
24 material that may be contained in an  
25 appraiser's work file might be notes on

1 HEDDEN

2 the appraiser's inspection. Did you  
3 review that information in Mr. Tener's  
4 report -- I'm sorry, in Mr. Tener's work  
5 file?

6 A. No.

7 Q. You also said it may contain some  
8 public information that the appraiser  
9 considered. Did you review any such  
10 information in connection with your review  
11 of Mr. Tener's report?

12 A. To the extent that any of those  
13 legal documents relative to deed and  
14 recorded leases or memorandums and that  
15 that was contained in the exhibits, yes.  
16 However, relative to anything that's not  
17 already been produced in terms of public  
18 documents, no, I did not. Like tax bills,  
19 for instance.

20 Q. So do you know if any of that  
21 information was, in fact, in Mr. Tener's  
22 work file?

23 A. I am unaware.

24 Q. Okay. In point 2 of paragraph 23  
25 of your report, you say you conducted a

1 HEDDEN

2 site inspection of the subject property.

3 A. Yes.

4 Q. When did you perform that site  
5 inspection?

6 A. Oh, early part of September, I  
7 think.

8 Q. And do you recall what day of the  
9 week you visited the property?

10 A. I believe it was a Saturday.

11 Q. What time of day?

12 A. 4:30-ish, 4 or 4:30.

13 Q. And what did your site visit  
14 consist of?

15 A. Drove down Atlantic, drove across  
16 Vanderbilt, drove through the parking lot,  
17 came out the back of the site, looped  
18 around back onto Vanderbilt and then  
19 headed down Atlantic towards the Barclay  
20 Center.

21 Q. How long did the site visit last?

22 A. 10 minutes.

23 Q. Was that the first time you had  
24 ever been to this property?

25 A. Yes.

1 HEDDEN

2 Q. Had you ever been in this  
3 neighborhood before?

4 A. Yes.

5 MR. KOH: Objection. Go ahead.

6 BY MR. WALSH:

7 Q. When had you been in this  
8 neighborhood?

9 A. My son lives in Brooklyn so when  
10 I go and visit him, you know, I'm up and  
11 down Brooklyn and a radius from Fort Green  
12 to Park Slope to Boerum Hill to all over,  
13 so yeah, and when we go to dinner and  
14 stuff so I'm all around Brooklyn with my  
15 son.

16 Q. Where in Brooklyn does he live?

17 A. He lives in Boerum Hill.

18 Q. Had you ever been to Prospect  
19 Heights before?

20 A. Sure.

21 Q. When?

22 A. I don't recall. Numerous times.  
23 I'm all around.

24 Q. Had you ever been there for work  
25 before?



1 HEDDEN

2 A. I can't recall. I don't think  
3 so.

4 Q. Did you take pictures or notes  
5 during your site visit?

6 A. I took a couple of photographs of  
7 the building, yes, of the McDonald's site,  
8 yes, I did.

9 Q. So what did you observe about  
10 840 Atlantic Avenue and the surrounding  
11 area during your site inspection?

12 A. At the time of day that I was  
13 there significant traffic volume. I had  
14 people on bikes pull up alongside of me.  
15 It was difficult to make a left-hand turn  
16 without hitting a pedestrian in the  
17 crosswalk. It was crazy. People were  
18 coming in for early burgers so the parking  
19 lot was very congested and very busy. And  
20 then at the time I can't recall, there was  
21 a street closure and there was I want to  
22 say a food festival or an activity down  
23 the street there is my best recollection  
24 so those are my observations.

25 Q. Okay.

1 HEDDEN

2 How many lanes of traffic are on  
3 each side of this portion of Atlantic  
4 Avenue?

5 A. I can't recall. Specifically, I  
6 don't know. I would be guessing.

7 Q. Do you remember if there's more  
8 than one lane on each side?

9 A. Yes.

10 Q. And what do you remember?

11 A. There's more than one.

12 Q. Okay. And you said you also  
13 drove down Vanderbilt Avenue?

14 A. I drove around Vanderbilt Avenue.  
15 Down, up, around, I was in the  
16 neighborhood and I drove around. I don't  
17 recall.

18 Q. Okay. What did you observe about  
19 this portion of Vanderbilt Avenue during  
20 your site visit?

21 A. Across Atlantic on Vanderbilt  
22 there's a very large building so -- and  
23 then there was the -- as you looked down  
24 towards the Barclay Center you see that  
25 the infill of the high-rises over the

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2 tracks as it relates going close to the  
3 subject property and then -- I mean that's  
4 the best I'm recalling in my mind what I  
5 saw at the time and that's the best of my  
6 recollection as we stand here.

7 Q. Do you recall how many lanes of  
8 traffic are on each side of this portion  
9 of Vanderbilt Avenue next to the  
10 restaurant?

11 A. There might have been one in each  
12 direction and then a turning lane so --  
13 but that's the best I can recall. It's  
14 really, there was something keeping up on  
15 my right-hand side, whether it was  
16 reconstruction of the sidewalk or  
17 something because the bikes were right up  
18 alongside my car so again, that's the best  
19 I can recall.

20 Q. How much pedestrian foot traffic  
21 did you observe during your site visit?

22 A. How much is a relative term. I  
23 saw people.

24 Q. You saw a few people?

25 A. They were in the crosswalk and it

1 HEDDEN

2 kept interfering with my ability to get  
3 across the street.

4 Q. If you could just quantify, was  
5 it dozens of people walking down the  
6 street, was it a handful?

7 A. It was not Manhattan and 42nd  
8 Street. There was a steady stream of  
9 folks walking across on a 4:30 on a  
10 Saturday afternoon, the baby carriages and  
11 the like. 20, 15, 10, somewhere in there.

12 Q. As you were standing at the  
13 McDonald's and looking across Vanderbilt  
14 Avenue, what do you see across Vanderbilt  
15 Avenue from the McDonald's?

16 A. An office building.

17 Q. Okay. Anything else?

18 A. There was an office building.

19 Q. Okay. And do you recall seeing  
20 any rail yards or rail lines?

21 A. So can you direct me please,  
22 again which way am I looking?

23 Q. You're looking across Vanderbilt  
24 Avenue from the McDonald's.

25 A. From the McDonald's, Vanderbilt

1 HEDDEN

2 down towards -- in a southerly direction?

3 Q. Looking right across Vanderbilt.

4 I guess looking right across Vanderbilt.

5 I guess it's looking west.

6 A. Okay, good. So if I'm looking

7 down Atlantic, you're telling me I'm

8 looking down towards the Barclay Center,

9 I'm standing at the McDonald's and I'm

10 looking towards the Barclay Center; right?

11 Q. Right, directly across

12 Vanderbilt.

13 A. Maybe I'll pull up a Google map

14 and I'll be able to describe it.

15 Q. That's not necessary.

16 A. My best recollection I've already

17 described this as best I can recall.

18 Q. Okay. Do you remember seeing a

19 rail line or rail yards during your site

20 inspection?

21 A. I just spoke of that earlier in

22 the prior paragraph, yes, I do.

23 Q. So what do you recall about them?

24 A. Not much.

25 Q. Okay. How far do they stretch?

1 HEDDEN

2 A. Again, I don't recall the number  
3 of blocks but a few blocks.

4 Q. So you don't know?

5 A. I don't recall without looking at  
6 a map.

7 Q. What is located at street level  
8 directly along the stretch of Atlantic  
9 across the rail lines?

10 A. I don't recall.

11 Q. What about on street level on  
12 Atlantic Avenue across from the rail  
13 lines?

14 A. Again, I was driving. I don't  
15 recall. I looked at it from satellite  
16 Google Earth and I did the street scene as  
17 part of some reconnaissance I did on this  
18 project but I don't recall.

19 Q. Did you notice what types of  
20 businesses are located on the same block,  
21 Atlantic Avenue, as the McDonald's?

22 A. No, I don't.

23 Q. Did you notice any retail in the  
24 blocks surrounding 840 Atlantic Avenue?

25 A. My general recollection is a

1 HEDDEN

2 street, retail along the first floor but I  
3 don't recall exactly the kind of retail or  
4 anything. Again, like I said, I was  
5 driving and watching traffic. I don't  
6 recall.

7 Q. So you're not sure what, if any,  
8 retail is in the area immediately  
9 surrounding the McDonald's at 840 Atlantic  
10 Avenue?

11 A. That's correct.

12 Q. Okay. What neighborhood of  
13 Brooklyn is 840 Atlantic Avenue in?

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: I don't recall.

16 BY MR. WALSH:

17 Q. Okay. Do you know what  
18 neighborhoods surround the property?

19 A. No, I can't mention them at this  
20 time without looking at a map.

21 Q. Okay. What specific parts of  
22 Brooklyn do you consider to be comparable  
23 to the area immediately surrounding  
24 840 Atlantic Avenue?

25 A. I don't have any opinion. I

1 HEDDEN

2 wasn't asked to do that research so I  
3 can't authoritatively speak at this time.

4 Q. If we could turn to paragraph 13  
5 of your report. It says, "I have been  
6 retained as an expert by Meister Seelig &  
7 Fein," and then I'm going to skip a little  
8 bit down to the fourth line, "to examine  
9 the restrictive appraisal report and  
10 workpapers prepared by Thomas J. Tener."

11 Do you see that?

12 A. Yes.

13 Q. But you didn't actually review  
14 all of Mr. Tener's work papers; right?

15 A. I don't know that to be the case.  
16 The work papers in this paragraph as  
17 defined from my prior testimony were those  
18 exhibits that were produced in this matter  
19 and I assume them to be the work papers.

20 Q. But you didn't confirm with  
21 anyone?

22 A. No.

23 Q. So paragraph 13 of your report  
24 does not reference KTR's earlier  
25 restricted report dated April 15, 2019.



1 HEDDEN

2 Have you reviewed that report?

3 A. I remember seeing it but reviewed  
4 is a term of art that I did not conduct a  
5 USPAP standard three-appraisal review of  
6 that report but I generally looked at it.

7 Q. And what do you recall about the  
8 differences between the April 15, 2019 and  
9 July 30, 2019 KTR reports?

10 A. I believe one of the differences  
11 was the inclusion of the residual  
12 analysis.

13 Q. And what is your understanding as  
14 to why a second report was issued on July  
15 30, 2019?

16 A. My understanding was based on  
17 meetings between the parties to this  
18 matter, there was an agreement that that  
19 analysis would be undertaken by Mr. Tener.

20 Q. So your understanding is there  
21 was an agreement that Mr. Tener would  
22 undertake a land residual analysis?

23 A. Yeah, I believe that's my  
24 understanding.

25 Q. Okay. If we could look at

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paragraph 15 of your report. Second sentence, "The scope of work relative to this ARR is to determine, one, whether: 1.) the report contains adequate and relevant data; 2.) the appraisal methods and techniques used in the report are appropriate given the language in the lease; and 3.) the analyses and opinions and conclusions in the report are appropriate, credible and reasonable for the intended use of the intended user within the context of the lease."

Let's start with the first of those points, to determine whether the report contains adequate and relevant data. What specific steps did you take to determine whether the report contains adequate and relevant data?

A. I looked at the report, the written report, the restrictive report and I looked at the spreadsheets that were produced as part of his work papers.

Q. Did you conduct any independent research?

1 HEDDEN

2 A. No. It was not necessary.

3 Q. Why do you believe it was not  
4 necessary?

5 A. Because the information that I  
6 found inside the report identified a  
7 significant number of comparables that  
8 Mr. Tener believed were, in fact,  
9 comparable and therefore, there was  
10 sufficient number of data points for him  
11 to render his opinion.

12 Q. Now, how did you determine that  
13 they were comparable?

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: My scope was not to  
16 determine, quote, if they were  
17 comparable, close quote. It was that  
18 his representation in the document and  
19 his testimony is that they were  
20 comparable and that's his opinion.

21 BY MR. WALSH:

22 Q. So are you rendering any opinion  
23 as to whether you agree with Mr. Tener's  
24 conclusions that certain -- that the comps  
25 identified in his work papers are, in

1 HEDDEN

2 fact, comparables?

3 A. No, I'm not rendering that  
4 opinion. My opinion is Mr. Tener believes  
5 that they are comparable and that's his  
6 opinion and that was sufficient and  
7 relevant enough and sufficient enough for  
8 me to come to my conclusion.

9 Q. And you did not believe you  
10 needed to test Mr. Tener's conclusion in  
11 that regard?

12 A. No, because based upon the way  
13 the lease is structured, that would be  
14 determined by the third appraiser that  
15 would be selected as part of the process  
16 and they would challenge his conclusion as  
17 to comparability if it was deemed so.

18 Q. Moving on to the second point,  
19 what specific steps did you take to  
20 determine if the appraisal methods and  
21 techniques used in the report are  
22 appropriate given the language in the  
23 lease?

24 A. Well, Mr. Tener used a standard  
25 appraisal technique in valuing vacant land

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which is sales comparison report of comparables that he deemed to think were similar and highest best use. So those comparables were included, appropriately adjusted and I say appropriately, they were adjusted based on his opinion as to the appropriate adjustments and came to a conclusion and that was bracketed by the data set that was provided. And then he continued to move on to do the residual approach and he followed methodologies that are part of the highest and best use analysis in looking at residual techniques and therefore, based upon that, methods and techniques used were appropriate given the language in the lease that he followed.

MR. WALSH: Okay. So let's pull up what's been previously marked as P69. It's the McDonald's lease.

VERITEXT CONCIERGE: One moment, please.

P69 has been introduced. Please refresh.

1 HEDDEN

2 BY MR. WALSH:

3 Q. Mr. Hedden, this is the  
4 McDonald's lease. I'd like you to scroll  
5 down to the bottom, towards the bottom,  
6 it's the option rent addendum. I believe  
7 it's Exhibit G.

8 A. Okay, so I'm seeing -- bear with  
9 me a second. All right. So 3 of 45 so  
10 I'm going to scroll down to what page  
11 number? 40 or 45.

12 Q. It's probably right around there.  
13 I'm scrolling myself. It's a little slow  
14 right now.

15 A. Same with mine. We'll see. Come  
16 on baby, let's go.

17 VERITEXT CONCIERGE: If it's at  
18 all helpful for loading purposes,  
19 there is a download button in the top  
20 right of the Exhibit Share screen.  
21 You can download it locally.

22 MR. WALSH: Yeah, that's probably  
23 a good idea. Thank you for that.

24 THE WITNESS: Thank you. All  
25 right. I've got it open. I'll scroll

1 HEDDEN

2 in a minute. I've got the download  
3 going on.

4 BY MR. WALSH:

5 Q. So it's page 41 of that pdf.  
6 It's the first page of the option rent  
7 addendum.

8 A. Okay, I'm there. Wait, okay  
9 we're there, option rent agreement or  
10 addendum.

11 Q. You just talked about how  
12 Mr. Tener used the sales comparison  
13 approach in his analysis; right?

14 A. Yes.

15 Q. And the first way that he valued  
16 the property was to analyze fee simple  
17 land sales of what he determined to be  
18 comparable properties; right?

19 A. Yes.

20 Q. Where in the option rent addendum  
21 does it say that the appraisers can value  
22 the fair market rental value of the  
23 property using sales, fee simple sales of  
24 land?

25 A. The second page of this addendum,

1 HEDDEN

2 the second to last paragraph, it says,  
3 "The standard market data approach  
4 technique in valuing vacant land shall be  
5 used by the appraisers."

6 Q. What does the next sentence say?

7 A. All comparable leases shall be  
8 appropriately adjusted, and the written  
9 report shall indicate the reasons for the  
10 adjustments so made."

11 Q. And then what about the next  
12 sentence?

13 A. "If adequate comparable leases  
14 are not available, then a land residual  
15 technique, as defined by the American  
16 Institute of Real Estate Appraisers, shall  
17 be used."

18 Q. Okay. So the second and third  
19 sentences of that paragraph talk about  
20 comparable leases; right?

21 A. Yes.

22 Q. They don't reference comparable  
23 land sales; right?

24 A. They do not.

25 Q. Okay. But it's -- do you believe



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2 that that language means that the  
3 appraisers were authorized to value the  
4 fair market rental value of the property  
5 using fee simple land sales as opposed to  
6 comparing and adjusting comparable ground  
7 leases?

8 MR. KOH: Objection. Go ahead  
9 and answer.

10 THE WITNESS: Yes.

11 BY MR. WALSH:

12 Q. Why do you believe that?

13 A. The keywords in those sentences  
14 are standard market data approach, which  
15 the Appraisal Institute recognizes as the  
16 sales comparison approach in the valuation  
17 of vacant land. The second sentence says  
18 all comparable leases. We focus on the  
19 word comparable and comparable would mean  
20 consistent with the highest and best use  
21 as deemed by the appraiser, and the  
22 ability to find leases that are deemed  
23 comparable and whether or not they could  
24 be adjusted. So the point being  
25 comparability and comparable -- in order

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to select a comparable it has to have a consistent highest and best use, and therefore the two sentences are somewhat conflicting in that it instructs the appraiser to use a sales comparison approach at the same time defined comparables that are consistent with the highest and best use as defined earlier on in this lease about the definition of market value between knowledgeable parties and neither duress and knowing what this property could be put to in terms of uses. And the reason why we're here is the conflicting language of the lease addendum guiding the appraiser to use a sales comparison approach but then also try to find leases that are deemed comparable given the fact pattern.

Q. Wouldn't adjusting comparable ground leases, reviewing and adjusting comparable ground leases, couldn't that also be considered a sales comparison approach of sorts?

MR. KOH: Objection. Go ahead.

1 HEDDEN

2 THE WITNESS: No, because I think  
3 that the terminology you just used a  
4 sales comparison is not dealing with  
5 leases. So you can do a lease  
6 adjustment analysis or a lease  
7 analysis and comparative like but it  
8 doesn't -- it's not part of the sales  
9 comparison.

10 BY MR. WALSH:

11 Q. Okay.

12 A. Which is the standard market  
13 approach that Mr. Tener used.

14 Q. So does the lease authorize the  
15 appraisers to calculate fair market rental  
16 value using more than one method?

17 A. Yes, I think that the sentence  
18 does that or the third sentence says that.

19 Q. Well, it says if adequate  
20 comparative leases are not available, then  
21 a land residual technique shall be used;  
22 right? So wouldn't you agree that that  
23 only applies if adequate comparable leases  
24 are not available?

25 A. Correct.

1 HEDDEN

2 Q. Okay. But Mr. Tener valued the  
3 property using two different methods;  
4 right?

5 A. Yes, as he was instructed to do.

6 Q. But the lease does not authorize  
7 him to use two separate methods, right, at  
8 the same time?

9 A. It uses the word shall so does  
10 that constitute authorization and then  
11 given legal instruction? I think it does.

12 Q. Did you take any other steps to  
13 determine if the appraisal methods and  
14 techniques used in the report are  
15 appropriate given the language in the  
16 lease?

17 A. Any other steps?

18 MR. KOH: Objection. Go ahead.

19 THE WITNESS: I'm confused by  
20 your question.

21 BY MR. WALSH:

22 Q. I'm just trying to understand  
23 what else, if anything, did you do to  
24 determine if the appraisal methods and  
25 techniques used in the report are

1 HEDDEN

2 appropriate given the language in the  
3 lease.

4 A. What I did was I looked at his  
5 land residual technique and method and he  
6 followed the steps in arriving at a land  
7 residual income consistent with the  
8 teachings in the highest and best use  
9 class as well as the textbook.

10 Q. What specific steps did you take  
11 to determine if the analyses, opinions and  
12 conclusions in the report are appropriate,  
13 credible and reasonable for the intended  
14 use?

15 A. So that question goes back to my  
16 expert report, right, the paragraph in  
17 question?

18 Q. Yes, this is paragraph 15.

19 A. All right, let me pull that up on  
20 the screen then. I'm waiting for it to  
21 refresh. I'll download it so we don't  
22 have this delay again. It's coming back.  
23 Hedden's expert report. It is coming up.  
24 Bear with me. I'm just going to do a  
25 quick download.

1 HEDDEN

2 Okay, good, it's up. So we're in  
3 paragraph what, sir?

4 Q. 15.

5 A. Thank you.

6 Q. Third point.

7 A. All right, there we are. So  
8 third point, "The analysis, opinions and  
9 conclusions in the report are appropriate,  
10 credible and reasonable for the intended  
11 use of the intended user within the  
12 context of the lease."

13 So your question is, just to  
14 repeat quickly?

15 Q. What specific steps did you take  
16 to determine if the analyses, opinions and  
17 conclusions in the report are appropriate,  
18 credible and reasonable for the intended  
19 use?

20 A. Okay, so we start with the  
21 intended use and the intended user which  
22 is the basis for which the report was  
23 prepared and the user being the  
24 knowledgeable, sophisticated, whatever  
25 clients I have here, the clients that

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Mr. Tener had in the landlord's position as well as the attorney, the use of the document then would be for this process in establishing a ground lease reset with the idea that you'd have two appraisers and then if they were outside of 15 percent each, then a third appraiser would be named and then the three appraisers would collaborate to opine and if that could so be reached that you have a majority. So this process for the intended use was deemed reasonable for the context of the lease which I just alluded to, the language in the lease, and that everything that was contained in the report, and again the report incorporating his work papers, in my opinion was appropriate and his conclusion was credible based on all the information before me. So that was the steps I used in coming to my conclusion that I did reach in my expert report and that's basically the process that I used in arriving at that opinion.

Q. Okay. All three of these

1 HEDDEN

2 determinations that you reference in  
3 paragraph 15, did you undertake any  
4 independent research in reaching the  
5 conclusions that you reached in your  
6 report?

7 A. The independent research that I  
8 may have done which I did do, was all  
9 subsequent to the date of value and the  
10 date of this report relative to what's  
11 currently involved in the subject  
12 property, right, which is not usable.  
13 Appraisers are not allowed to think about  
14 what was in the appraiser's ability to  
15 know as of the date that that appraiser  
16 rendered their opinion. So that might  
17 have been additional research that I knew  
18 of regarding the M-Crown zoning and the  
19 ultimate approval for this property. But  
20 again, that wasn't in my mindset when I  
21 considered this appraisal review. That  
22 answers your question as to additional  
23 research but it was not part of my  
24 ultimate conclusion.

25 Q. So what specific independent



1 HEDDEN

2 research did you do in your analysis?

3 A. In my analysis, I did no  
4 independent research because it wasn't  
5 called for, one, in my scope of work, or  
6 two, for me to render the opinion that I  
7 did given the language in the lease and  
8 given the use and user of this report,  
9 realizing that in similar situations it's  
10 the third-party appraiser who then  
11 reconciles between the two appraisers and  
12 given Mr. Tener's knowledge and competency  
13 and his use of all of the ethical  
14 standards relative to signing a  
15 certification and doing techniques and  
16 methods and the amount of information that  
17 was contained within the four corners of  
18 the report and the work papers, did not  
19 require me to do any independent research  
20 in order for me to come to my opinion  
21 relative to his fulfillment of the  
22 language contained in the lease to move  
23 this process forward.

24 Q. If we can move to paragraph 35 of  
25 your report.

1 HEDDEN

2 A. Okay.

3 Q. You state that "Highest and best  
4 use is defined as the reasonably probable  
5 use of property that results in the  
6 highest value. The four criteria that the  
7 highest and best use must meet are legal  
8 permissibility, physical possibility,  
9 financial feasibility, and maximum  
10 productivity"; is that right?

11 A. Yes.

12 Q. Okay. And is that the standard  
13 definition of highest and best use?

14 A. Yes.

15 Q. Okay. So just because a use is  
16 physically possible and legally  
17 permissible does not mean that the use is  
18 necessarily the highest and best use;  
19 right?

20 A. Correct.

21 Q. Okay. The use must also be  
22 adequately supported, financially feasible  
23 and result in the highest value; right?

24 A. Yes.

25 Q. And an appraiser's highest and

1 HEDDEN

2 best use conclusion is an incredibly  
3 important part of the analysis; right?

4 A. Yes.

5 Q. Why is that?

6 A. Because it's the basis for value,  
7 for market value, the basis of market  
8 value is the highest and best use.

9 Q. Okay. So what happens if the  
10 highest and best use analysis is not  
11 performed properly?

12 A. Then the appraiser would be  
13 directed to find comparables that aren't,  
14 in fact, consistent with the highest and  
15 best use and could lead to a value  
16 conclusion that would not be a market  
17 value.

18 Q. Can a --

19 A. Based on the incorrect selection  
20 of comparables driven by an incorrect  
21 highest and best use analysis.

22 Q. Can a property have more than one  
23 highest and best use?

24 A. I don't believe so. If you make  
25 a calculation and get to the highest

1 HEDDEN

2 value, you can have competing values and  
3 so how those competing -- excuse me,  
4 competing uses, how those competing uses  
5 are analyzed could alter one's opinion as  
6 to the highest and best use through their  
7 calculations but ultimately in its purest  
8 sense there can only be one highest and  
9 best use.

10 MR. WALSH: I'm sorry, there's  
11 some construction going on nearby.  
12 Can anyone hear that? Okay, good.

13 By MR. WALSH:

14 Q. Is it unusual for an appraisal  
15 report to have two -- to list two highest  
16 and best uses?

17 A. By definition as I just spoke,  
18 there could be competing uses but  
19 ultimately there is by definition I  
20 believe the highest value is the highest  
21 and best use and therefore I don't believe  
22 that there can be two highest and best  
23 uses.

24 Q. Okay. What is a market analysis?

25 A. Bear with me. There could be an

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interim highest and best use so not to misspeak, that's got an adjective to highest and best use, one ultimate highest and best use but then there could be an interim use that leads you to a highest and best use as I've defined in my report. So I want to make sure the record is clear as to my position on that.

Q. What is a market analysis?

A. A market analysis is as we speak in the treatises and in the course literature an analysis of the subject property and its productivity and its ability to compete in the marketplace. Then compared to the demand for such product, the supply of a product similar to the subject property and then looking at whether there's surplus demand or excess supply and from that come to a conclusion as to how the property will participate in the market and leading to an ultimate conclusion of performance of this property in the marketplace. And again this property meaning your property

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2 in question.

3 Q. So it sounds like you're talking  
4 about a marketability analysis; is that  
5 right? Is that the same as a market  
6 analysis or is marketability analysis  
7 something different?

8 A. Marketability analysis in my best  
9 recollection, not looking specifically at  
10 the material, but marketability is how  
11 that subject property is a site in search  
12 of a user versus a market analysis which  
13 is much more overarching or regarding a  
14 specific type of property in the market  
15 area so it's usually ground up versus top  
16 down.

17 Q. Would you agree that all  
18 appraisal assignments to develop an  
19 opinion of market value must include a  
20 marketability analysis?

21 A. No.

22 Q. You disagree with that?

23 A. Yes.

24 MR. WALSH: Okay. If we could  
25 mark as the next exhibit, I think it's

1 HEDDEN

2 P104.

3 VERITEXT CONCIERGE: One moment.

4 MR. WALSH: It's called advanced  
5 Market Analysis and HBU course  
6 handbook.

7 VERITEXT CONCIERGE: I see that.  
8 One moment, please. It's taking an  
9 extra second. Apologies.

10 MR. WALSH: It's a bit of a large  
11 file.

12 THE WITNESS: Yes, it is.

13 VERITEXT CONCIERGE: That might  
14 explain it.

15 MR. WALSH: And Mr. Hedden, I  
16 would recommend downloading this file  
17 once it is marked.

18 THE WITNESS: Yes, sir.

19 VERITEXT CONCIERGE: It's really  
20 taking its time. Okay, Exhibit P104  
21 has been introduced. Please refresh.

22 (Exhibit P104, Advanced Market  
23 Analysis and Highest & Best Use  
24 course handbook, marked for  
25 identification.)

1 HEDDEN

2 BY MR. WALSH:

3 Q. Mr. Hedden, if you can let me  
4 know once you're able to download that  
5 document.

6 A. Will do. I see the document just  
7 came up. Now I am clicking on it and  
8 downloading it. Wow, it came up pretty  
9 quick though but I will download the  
10 exhibit. Hang on a second. Almost there.  
11 I just opened the file and we are good.  
12 Go ahead, sir.

13 Q. If you could refer in part to --  
14 it's page 34 of the document. It's page  
15 67 of the pdf.

16 A. Yes, sir.

17 Q. It's in part 2 of this book. By  
18 the way, do you recognize this document?

19 A. Yes, sir.

20 Q. And what is it?

21 A. It is the handbook that I use  
22 when I teach the course An Advanced Market  
23 Analysis and Highest & Best Use. And so  
24 part 2, page what, sir?

25 Q. Page 34.



1 HEDDEN

2 A. Okay.

3 Q. And it's the second page of part  
4 2 after the preview.

5 A. Page 34. 36, 34, okay, yes, sir.

6 Q. So the first two pages of this  
7 part, define market analysis, market  
8 study, marketability analysis and about  
9 halfway on page 34 it says, "Note, all  
10 appraisal assignments to develop an  
11 opinion of market value include  
12 marketability analyses."

13 Do you see that?

14 A. Yes, I do.

15 Q. Now a moment ago you disagreed  
16 with my statement that all appraisal  
17 assignments to develop an opinion of  
18 market include a marketability analysis;  
19 right?

20 A. Correct. I stand corrected. The  
21 material is correct and I testified  
22 incorrectly. It's clearly market value  
23 includes marketability analysis.

24 Q. Okay. Now, what does -- what  
25 does that entail? What is involved in

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performing a marketability analysis for a property? I know you now have the course materials in front of you. I'm not asking you to review the course materials and summarize them. I'd actually prefer it if you could close that down and just tell me what your understanding of a marketability analysis is and what that entails.

A. Where I got confused on my earlier testimony is market study, market analysis, market area, but the marketability analysis basically compares the subject property to your market analysis. So to the extent that you have now done your supply and demand and your other market analysis, you then compare your subject property to that analysis to understand how your property competes in the marketplace.

Q. Okay. And so there's six steps in the process; right? You've got to analyze property productivity first; right?

A. Yes.

1 HEDDEN

2 Q. You've got to delineate the  
3 market area and the competitive market  
4 area; right?

5 A. Um-hmm, yes.

6 Q. You've got to project or forecast  
7 demand for that property; right?

8 A. Yes.

9 Q. You've got to measure and project  
10 competitive supply; right?

11 A. Correct.

12 Q. You've got to calculate residual  
13 demand; right?

14 A. Yes.

15 Q. And then you've got to project  
16 subject capture; right?

17 A. Correct.

18 Q. And so the market analysis helps  
19 determine the financial feasibility of a  
20 specific use; right?

21 A. Yes.

22 Q. So in order to understand the  
23 financial feasibility of a specific use,  
24 you have to conduct a marketability  
25 analysis; right?

1 HEDDEN

2 A. Yes.

3 Q. And that involves understanding  
4 the supply and demand for this particular  
5 use in this particular location; right?

6 A. That's correct.

7 Q. Okay. And a use cannot be  
8 financially feasible if it's not  
9 appropriately supported by the market;  
10 right?

11 A. Correct.

12 Q. So how does an appraiser  
13 determine if the market exhibits  
14 appropriate support for a specific use of  
15 a property?

16 A. Well, there are two methods one  
17 could use, there's an inferred method for  
18 less complex and simple assignments and  
19 there's a fundamental method which is used  
20 for more complicated or problematic  
21 properties. And those are the two  
22 so-called methods that one can use in  
23 determining the market analysis.

24 Q. So which method did Tom Tener  
25 use?

1 HEDDEN

2 A. I am not knowledgeable as to  
3 which method he used.

4 Q. Why not?

5 A. It was not alluded to in his  
6 testimony, nor was it in his work papers  
7 and it was not in his appraisal report.

8 Q. But you determined that his  
9 conclusions were credible and reliable;  
10 right?

11 A. Yes.

12 Q. So how did you do that if you  
13 don't understand how he conducted a  
14 marketability analysis to determine if the  
15 use was financially feasible?

16 A. Mr. Tener's expertise in the  
17 market, coupled with the fact that he is  
18 knowledgeable of this market area and  
19 given the complexity of the problem to  
20 arrive at a ground rent using the  
21 methodologies prescribed in the lease  
22 would not necessitate the more complex  
23 marketability study that you've alluded  
24 to. What is inferred, meaning relying  
25 upon his knowledge of the market coupled

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with historical information and the information that he has available to him led him to the conclusion that it was financially feasible based upon his expert opinion. So it was -- I am allowed to then render my conclusion as to his credibility, relying upon his knowledge of the marketplace and his expertise and his conclusion that in his residual analysis that is, his hypothetical analysis was feasible.

Q. You've only worked with Tom Tener once before; isn't that right?

A. Correct.

Q. So what is your understanding -- what is the basis for your belief that he has a special expertise in this marketplace?

A. Having been practicing in the New York market and been in this business for 40 years, knowing the Tener name is associated with KTR, knowing his colleagues, Theresa Nygard and others in the firm, they have a very highly regarded

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reputation. And it's my opinion that based upon looking at his résumé and having met him briefly in the assignment that we spoke of a couple years ago, that it would be his learned opinion that it's financially feasible under this hypothetical construct to prepare the residual analysis that he did, and that's the basis for my conclusion.

Q. So you believe that he's an expert and he concluded it was financially feasible so therefore you concluded he must be right?

MR. KOH: Objection. Go ahead.

THE WITNESS: I concluded that based on the intended use and the intended user and for the purposes this appraisal was being prepared that the analysis that he did under a hypothetical construct being hypothetical nature and a land residual analysis that was conducted did not lead me to a conclusion that his conclusion of the appropriate

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2 ground rent was not credible. In  
3 other words, it was credible,  
4 notwithstanding the lack of, quote,  
5 marketability analysis, that may not  
6 have been included in his work papers  
7 in his calculation of the residual  
8 analysis. So my belief is that he  
9 believes that it was credible or  
10 possible and feasible and therefore I  
11 accepted his conclusion.

12 BY MR. WALSH:

13 Q. Do you agree that current sales  
14 and leasing activity can indicate the  
15 strength of a market?

16 A. Yes.

17 Q. And do you agree that if an  
18 appraiser is considering the financial  
19 feasibility of a vacant site for retail  
20 use, the market should be investigated for  
21 recent sales of unimproved properties to  
22 end users for that purpose?

23 A. Yes, it would be helpful, yes.

24 Q. And what does it suggest to you  
25 if there are no such sales for that



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2 purpose?

3 A. That the demand for such purpose  
4 is lacking.

5 Q. Okay. Are you aware of any sales  
6 of vacant sites for a retail use in this  
7 specific market or comparable markets?

8 A. Yes.

9 Q. Where?

10 A. There are two transactions that I  
11 can think of that came to light while I  
12 was doing work on another matter that  
13 involved the development in Staten Island  
14 of a Lydell grocery store that is going to  
15 be positioned in a location that's  
16 confidential. But in light of that, I  
17 came upon two transactions, one in  
18 Brooklyn, one in Queens, of a knockdown of  
19 a funeral home and an adjoining property  
20 and the development of a Flanigan, Raymour  
21 & Flanigan furniture store with parking  
22 beneath. And then I came across another  
23 knockdown of a facility and the  
24 development of a health club fitness  
25 center. I believe it's in Queens. So

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2 these types of transactions do occur and  
3 so to be specific to your question, yes, I  
4 am knowledgeable in two situations where  
5 for specific type of destination users  
6 like a furniture store and a fitness  
7 center, these types of redevelopment occur  
8 -- these redevelopment types of properties  
9 do occur.

10 Q. Okay. Were any of those  
11 identified in any of the work papers that  
12 you reviewed of Tom Tener's?

13 A. No.

14 Q. Do you know if he identified any  
15 sales of properties for an intended retail  
16 use?

17 A. I am not aware.

18 Q. So if Tom Tener had not  
19 identified any such sales, wouldn't he  
20 have concluded that there was not  
21 sufficient demand for this specific use?

22 MR. KOH: Objection. Go ahead  
23 and answer.

24 THE WITNESS: The analysis that  
25 you allude to in Mr. Tener's work is a

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hypothetical. It's clearly prepared to accommodate this request to produce an additional method where it said shall in the work papers -- excuse me, in the lease addendum shall prepare a residual analysis under these hypothetical constructs and given the existing zoning, he's limited in his ability to ultimately opine to the highest and best use of this site. This construct that he prepares in terms of its retail use and feasibility is an interim use and not the highest and best use. So therefore, the detailed market analysis or demand analysis or whatever is really secondary because he doesn't give it a lot of weight ultimately in his conclusion. It's a supported check against the standard appraisal approach which is the sales comparison and -- or sales of other properties, and therefore, it was of no matter to me relative to the

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2 complexity of his analysis but the  
3 fact that it wasn't necessary to come  
4 to my conclusion that Mr. Tener's  
5 ultimate conclusion is credible and  
6 for the intended use and consistent  
7 with the lease language, so it's of no  
8 mind to me.

9 BY MR. WALSH:

10 Q. What specific work are you aware  
11 of that Mr. Tener did to determine if  
12 there was a demand at this specific  
13 property for a 21,500 square foot retail  
14 building?

15 A. I am not aware of any analysis he  
16 may have done specific to your fact  
17 pattern in your question.

18 MR. WALSH: Okay. So we've been  
19 going for about an hour and 25. If we  
20 could just take maybe a five,  
21 10-minute break.

22 THE WITNESS: I'm fine with that.

23 THE VIDEOGRAPHER: The time is  
24 2:39 p.m. and we're going off the  
25 record.

1 HEDDEN

2 (Recess taken from 2:39 p.m. to  
3 2:50 p.m.)

4 THE VIDEOGRAPHER: The time is  
5 2:50 p.m. We're back on the record.

6 BY MR. WALSH:

7 Q. Mr. Hedden, before we broke, you  
8 testified that you came across some other  
9 transactions in other boroughs, I believe,  
10 where properties were purchased and then  
11 developed for a retail use. Do you recall  
12 that?

13 A. Yes.

14 Q. I think you said there was one in  
15 Staten Island that was for a grocery store  
16 and then you said one in Brooklyn, one in  
17 Queens, a knockdown of a funeral home and  
18 the development of a Raymour & Flanigan  
19 furniture store. Do you recall that?

20 A. Yes.

21 Q. So which of those was in  
22 Brooklyn?

23 A. Raymour.

24 Q. Where was that property?

25 A. I don't recall. I don't have the

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2 paperwork in front of me.

3 Q. Were the sales prices for those  
4 properties consistent with the conclusions  
5 of value that Mr. Tener determined in his  
6 July 30 report?

7 MR. KOH: Objection. Go ahead.

8 THE WITNESS: The sales  
9 transaction prices would be irrelevant  
10 to me.

11 BY MR. WALSH:

12 Q. And why is that?

13 A. It goes to your point earlier  
14 that you were inquiring, relative to the  
15 demand for these types of uses and does it  
16 occur, and so whether or not the  
17 transaction prices and everything else is  
18 all irrelevant because the behavior of  
19 buyers that are trying to get into a  
20 marketplace to establish a retail use is  
21 what we were discussing. And so yes,  
22 those types of events do occur and that's  
23 the only reason why I mentioned those  
24 transactions.

25 Q. Okay.

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2 A. It has nothing to do with the  
3 price.

4 Q. I understand you believe that the  
5 price is irrelevant. My question is were  
6 those prices on a square foot basis  
7 consistent with the conclusion that  
8 Mr. Tener reached in his report?

9 MR. KOH: Same objection. Go  
10 ahead.

11 THE WITNESS: I never analyzed  
12 that so I don't know.

13 BY MR. WALSH:

14 Q. If we could go to Mr. Tener's  
15 July 2019 report, that's P36. And I'm  
16 looking at page 2 of his report. Right  
17 above, there's a table that says Zoning  
18 Floor Area Of The Demised Premises. It's  
19 on the page ending in 1047 Bates stamp.

20 A. Bear with me a second. I've got  
21 to go pull that report up again. I didn't  
22 have it saved down so I have to go back to  
23 the exhibit store and pull it down again,  
24 I apologize. I'll get it in a second.

25 Okay, it's up. Hang on a second.

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2 P36; right?

3 Q. Yes. Page 2.

4 A. I'll download it so we don't have  
5 that delay again. It's opening. We're on  
6 page -- okay, Bates -- 1047. Go ahead.

7 Q. Third full paragraph towards the  
8 bottom where he talks about highest and  
9 best use, he said, "Based on the subject's  
10 current zoning and considering the uses  
11 exhibited by recent development in the  
12 immediate area, the highest and best use  
13 of the subject, as if vacant, would be  
14 commercial development in the portion of  
15 the site zoned M1-1 and residential  
16 development in the R6B zoned portion of  
17 the site."

18 Do you see that?

19 A. Yes.

20 Q. And do you understand that  
21 Mr. Tener reached that conclusion assuming  
22 that the property was not encumbered by  
23 the remaining 20-year term of the  
24 McDonald's lease?

25 A. Yes, I would assume, yes, that's



1 HEDDEN

2 correct.

3 Q. Okay. And using land sales for  
4 these different -- I guess for those uses,  
5 he arrived -- he then used an 8 percent  
6 ground lease rate to determine the fair  
7 market rental value of the property; is  
8 that right?

9 A. Yes.

10 Q. And do you believe that that  
11 portion of his analysis, meaning the 8  
12 percent ground lease rate is supported by  
13 adequate and relevant data?

14 A. Yes.

15 Q. And what is that belief based  
16 upon?

17 A. I think from the number of  
18 transactions, the historical perspective  
19 and the amount of information contained  
20 therein was the basis of my conclusion.

21 Q. Did you do any independent  
22 research to determine if that 8 percent  
23 amount was appropriate?

24 A. No.

25 Q. Okay. Are you aware that 10 of

1 HEDDEN

2 the 39 leases that Mr. Tener used in that  
3 analysis date back to the 1950s?

4 A. Yes.

5 Q. Okay. And are you aware that  
6 Mr. Tener did not know when those rate  
7 increases were negotiated?

8 A. I recall that was his testimony.

9 Q. Okay. So do you believe that  
10 rates negotiated in the 1950s could be  
11 relevant to determining the fair market  
12 value of a property in 2019?

13 A. Well, I think the perspective  
14 that I took on that analysis or the length  
15 of historic information that Mr. Tener  
16 relied upon was relevant in his conclusion  
17 based on the fact that it would smooth out  
18 economic cycles over time and to the  
19 extent that we are at historically low  
20 interest rate environment and considering  
21 that the conclusion would be based on the  
22 future 20 years, that it was useful to  
23 consider the time span and the type of use  
24 in his conclusion, and that is the context  
25 in which I took the longevity of the

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2 information as relevant.

3 Q. Do you know when those rates were  
4 negotiated?

5 A. No.

6 Q. Is 8 percent typical or  
7 consistent with what you see in the  
8 market?

9 MR. KOH: Objection. Go ahead.

10 THE WITNESS: Given what time  
11 frame?

12 BY MR. WALSH:

13 Q. April of 2019.

14 A. And what type of property?

15 Q. This property.

16 A. Okay. So yes, I believe that the  
17 fact that the data that he was using  
18 coupled with my knowledge generally of  
19 from reading all the different pieces of  
20 information that I've read on the articles  
21 and everything else, that 8 percent was  
22 reasonable and that it would be subject to  
23 debate between the two appraisers and the  
24 third appraiser that would be selected as  
25 a part of this process and so that's how

1 HEDDEN

2 that conclusion Mr. Tener reached would be  
3 reconciled.

4 Q. So what specific data are you  
5 aware of in the Brooklyn market that is  
6 supportive of an 8 percent rate?

7 A. When you talk about the Brooklyn  
8 market, we're talking about land beneath a  
9 development on a larger scale. These  
10 types of properties when they do lease and  
11 when they do trade are not just relative  
12 to a Brooklyn market but the larger  
13 New York and even sometimes national  
14 market. So I don't think you're going to  
15 tie it specifically to Brooklyn so that's  
16 my position on that.

17 Q. Are you aware of any specific  
18 data that is supportive of that rate in  
19 Brooklyn?

20 A. No, not anything that was not  
21 contained in the Tener report.

22 Q. Okay. If you had been doing this  
23 analysis, what data would you have used?

24 MR. KOH: Objection. Go ahead.

25 THE WITNESS: Well, I haven't

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been doing this analysis and I really hadn't thought about that in this context so I would have to reserve on that opinion. I'm not offering that opinion and, you know, so I haven't thought of that so I can't answer your question.

BY MR. WALSH:

Q. But Tom used it and so you believe it was appropriate because Tom used it?

A. Well, and given the source, right, and Tom used it but it came from his appraisal files and what I do know is that the fact that TN alongside the notations and that came from Theresa Nygard and she's one of the leading experts in this area of practice. So to the extent that it was in their office files and that was the source, I deemed it to be reliable and credible.

Q. Is your conclusion that this was reliable and credible based on anything other than the fact that it was contained

1 HEDDEN

2 in Tom and Theresa's work files?

3 A. I would say coupled with my 40  
4 years of experience in having looked at  
5 ground leases and having understood what  
6 parameters are used in establishing ground  
7 rents in this general market area over  
8 this time frame. So again, added to their  
9 work and this file comes from my years of  
10 experience and knowledge as to what's a  
11 reasonable parameter which ground rent  
12 capitalization rates can be established.

13 Q. Okay, but I just asked you  
14 earlier what specific data you are aware  
15 of that is supportive of that and you  
16 couldn't identify any, can you?

17 A. That's correct.

18 Q. Okay. Do you agree with  
19 Mr. Tener's conclusion that there were no  
20 comparable leases for him to adjust in  
21 arriving at his valuation?

22 A. I believe it's credible and  
23 believable.

24 Q. But do you agree with that  
25 conclusion?

1 HEDDEN

2 MR. KOH: Objection. Go ahead  
3 and answer.

4 THE WITNESS: You know my role as  
5 to whether or not I agree in my scope  
6 of work here and what I was asked to  
7 do doesn't reach me to a conclusion  
8 whether I agree. I find his  
9 conclusion credible based on what I  
10 have experienced or knowledgeable  
11 about trying to find comparables for  
12 20-year leases of this kind of  
13 property in a market area. They don't  
14 exist that I'm aware of so I believe  
15 him to -- I believe his conclusion is  
16 credible in that regard.

17 BY MR. WALSH:

18 Q. Do you know what Mr. Tener did to  
19 determine if there were comparable leases?

20 A. No, other than I believe he just  
21 did a general investigative but I have no  
22 specifics as to exactly what he did.

23 Q. Okay. If we could turn to page 4  
24 of Mr. Tener's July 30, 2019 report.

25 Notwithstanding his statement at page 2

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2 that the highest and best use of the  
3 subject as if vacant would be commercial  
4 development in the portion of the site  
5 zoned M1-1 in the residential development  
6 in the R6B zoned portion of the site,  
7 Mr. Tener states on page 4 that the most  
8 probable hypothetical improvement,  
9 assuming full return on investment over a  
10 20-year term, would be retail.

11 Do you see that?

12 A. Yes.

13 Q. And this is the interim highest  
14 and best use that you were referring to  
15 earlier?

16 A. Yes.

17 Q. By definition isn't an interim  
18 highest and best use going to be less  
19 valuable than the highest and best use?

20 A. That's a difficult question to  
21 answer because the interim highest and  
22 best use could give you a higher present  
23 value in the short term than having to  
24 wait for the property to mature and to  
25 achieve its final highest and best use in



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the future. The construct in this assignment has made for very complicated economic principles that are not easily explained. So my response is traditionally you would expect the interim to be a highest and best use for a short period of time before the property matures. It's complicated.

Q. Okay, but for a period of 20 years, if the highest and best use over a period of 20 years is retail, wouldn't you expect to see people developing properties in that area for retail?

A. This hypothetical construct is only as a result of instruction and precedent law and the situation in which we find ourselves in in this confusing language in a addendum ground lease. So if you stepped back, the ultimate highest and best use just got approved by city council last year for 170 -- Tom's calculation says it could have been 170,000 square foot of high-rise apartment and we know it got approved for 18-floor

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apartment building, right, so 18-story apartment building. So the idea that we're discussing this is only in this hypothetical situation, otherwise knowledgeable participants in this deal would not think about highest and best use as commercial at all. The highest and best use would be wait for it to become approved under the M zoning and then redevelop the site so you would be in a period of abeyance for a period of years. Let's just step back. The way this was crafted and the way these appraisals are prepared by both sides has to be reconciled by a third-party appraisal. There's no easy way out of this so I'm sorry I got off topic.

The point here is that you would expect that this retail and this hypothetical would -- the way it's constructed would be the only way that you could possibly get the return of and on at a reasonable return rate would be a retail property like he has hypothetically

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opposed on this site. So that is why this 21,500 square foot retail building appears when, in fact, the calculation should have been 36,000 square feet of potential FAR. So it's just a hypothetical construct that Mr. Tener uses in this context to satisfy the requirement of valuing the property as encumbered. And I apologize for going off on that long-winded answer but that's the problem that you're faced here with and why it's got to be solved by a third party appraiser to try to pull everybody together and figure out exactly which way this goes. It's not easily done.

Q. Mr. Tener's report concludes that the fair market rental value of the property is potentially higher as encumbered by the remaining 20-year term of the lease than it was as not encumbered by the lease; right?

A. Correct.

Q. And you believe that to be a credible conclusion?

A. It's credible in the context of

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how this report is crafted and the fact pattern in which he had to follow. He doesn't give it the greatest weight, he only calls it as a supportive check and the opinion that he reaches, which is credible, is the rent that it was given under a standard approach using sales and using a capitalization rate that is credible. So the methodology that you have here is how is it higher? Well, it's higher because of the construct that he uses. He doesn't opine here, he actually steps it down and was using the lower end of the range and oftentimes many of his conclusions in that residual analysis so ultimately conservative.

But if you were really doing a land residual you'd build it out as potential zoning at 170,000 square feet and then wait a couple years and then develop it accordingly as willing buyer, willing seller, full knowledgeable, blah, blah, blah, would develop this site so this is purely hypothetical and not really

1 HEDDEN

2 credible in a true sense other than the  
3 fact that the credible opinion, it results  
4 in his final conclusion.

5 Q. But the lease and the case law  
6 required the property to be valued as  
7 encumbered by the lease; right?

8 A. Yes.

9 Q. So what the property is worth or  
10 what the fair market rental value is as  
11 unencumbered by the lease is entirely  
12 irrelevant to this appraisal problem,  
13 isn't it?

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: No.

16 BY MR. WALSH:

17 Q. How can that be if the lease and  
18 the law require the property to be valued  
19 as encumbered by the 20-year term of the  
20 lease?

21 A. That's an absolute answer and  
22 that would be determined either by the  
23 third party or by judicial determination  
24 as to exactly what is applicable here. We  
25 have Mr. Missry saying that it's not

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applicable here and that's to be determined by others. My point would be then that the methodology that is prescribed in the addenda of the lease relative to this process has been followed by Mr. Tener to the ability that he could under the precedents that were set and he put together a hypothetical to consider that. And he did. But he opines to a lower rent based on another methodology as prescribed under the standard method of appraising these properties. So again it's betwixt and between but it's not absolute that this is the only methodology to prescribe.

Q. Turning back to Mr. Tener's hypothetical retail improvement, you would agree that for a use to be financially feasible the market must exhibit appropriate support for the use; right?

A. Yes.

Q. And a use cannot be financially feasible if it is not appropriately supported by the market; right?

1 HEDDEN

2 A. At that moment in time but it  
3 could become financially feasible in the  
4 future. It's just under current. That  
5 use now, again what we teach in the  
6 course, it may not be financially feasible  
7 now but if supply and demand changes over  
8 time, it is in market analysis ability to  
9 project it in the future, it does become  
10 financially feasible.

11 Q. If you could pull up the advanced  
12 market analysis handbook again and turn to  
13 page 50 in part 2.

14 A. Page 50, part 2. I'm glad we  
15 downloaded these. Hang on. Page 48 part  
16 2. Measuring financial feasibility.

17 Q. Second bullet under financial  
18 feasibility. It says, "In short, for a  
19 use to be financially feasible, the market  
20 must exhibit appropriate support for the  
21 use. A use cannot be financially feasible  
22 if it is not appropriately supported by  
23 the market."

24 So do you disagree with that  
25 statement?

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2 A. No, I agree with it.

3 Q. Okay. And you would also -- and  
4 you're not aware of any specific steps  
5 that Mr. Tener took to determine if there  
6 was demand for this specific retail use at  
7 this specific property; right?

8 A. Correct.

9 Q. Okay. Are you familiar with the  
10 property located at 470 Vanderbilt Avenue?

11 A. Can you be more specific?

12 Q. So if you're standing at the  
13 McDonald's restaurant and looking diagonal  
14 across Vanderbilt and Atlantic so the  
15 property directly diagonal to the  
16 McDonald's, the opposite corner of  
17 Vanderbilt and Atlantic, that is  
18 470 Vanderbilt Avenue. Are you familiar  
19 with that building?

20 A. Is it the one owned by RXR and  
21 got NYSHA as a primary tenant?

22 Q. I believe that's the one.

23 A. I apologize the number is  
24 escaping me but yes, I am familiar with  
25 that office building across the street.



1 HEDDEN

2 Q. Are you aware that as of April  
3 15, 2019, 14,895 square foot of retail  
4 space located on the ground floor of that  
5 building directly across the street from  
6 the McDonald's had sat vacant for over six  
7 years since 2015?

8 A. I became aware of it after I  
9 completed my report.

10 Q. Okay. What, if anything, does  
11 that fact tell you about the demand for  
12 large retail spaces in this specific  
13 market in Brooklyn?

14 A. Well, what it tells me is that it  
15 may attract a different user than that  
16 envisioned by Mr. Tener.

17 Q. They are both for retail uses;  
18 right?

19 A. Yes. However, retail can be  
20 convenience retail, destination retail,  
21 specialty retail. Retail can be broken  
22 down into many categories.

23 Q. Well, look, I understand you're  
24 doing your best to try to defend  
25 Mr. Tener's work here, but doesn't the

1 HEDDEN

2 fact that that large retail space directly  
3 across the street had sat vacant for over  
4 six years indicate that there may not be  
5 demand for large retail spaces in this  
6 specific market in Brooklyn?

7 MR. KOH: Objection. Brendan, we  
8 can do without those kind of  
9 predicates. Go ahead and answer.

10 MR. WALSH: I stand by my  
11 question.

12 THE WITNESS: Yes, and there  
13 might be problem with that space. It  
14 may not be the right configuration.  
15 It might be not suitable for say a  
16 destination retailer who wants their  
17 own standalone location. There might  
18 be transactionals issues, frontage  
19 issues. Again like I said,  
20 configuration of the space. There  
21 might be a lot of reasons why that  
22 space hasn't leased. It could be the  
23 neighboring tenant. It could be the  
24 fact that a retail doesn't want to be  
25 in a building with the office

1 HEDDEN

2 occupancy as it's set up. Just  
3 because a space sat vacant doesn't  
4 mean that you can't have a competing  
5 retail space in the market area that  
6 would attract a different user.

7 BY MR. WALSH:

8 Q. Okay. I understand that there  
9 may be hypothetical reasons. Are you  
10 aware of any specific reasons or specific  
11 problems with that retail space across the  
12 street?

13 A. No, other than looking at a  
14 schematic I got from CoStar to see how the  
15 layout is and look at where the access  
16 points are on Atlantic Avenue, other than  
17 that information that was gotten from  
18 public sources I have no other knowledge.

19 Q. And so you're not aware of any  
20 defects or problems with that specific  
21 space, are you?

22 MR. KOH: Objection. Go ahead.

23 THE WITNESS: Other than looking  
24 at it as a retail expert like I am, I  
25 mean I have no other knowledge other

1 HEDDEN

2 than my general real estate acumen.

3 BY MR. WALSH:

4 Q. If Mr. Tener had performed a  
5 proper marketability analysis, shouldn't  
6 he have identified this 15,000 square foot  
7 retail space directly across the street  
8 that had been vacant for six years and at  
9 least investigated why that space was  
10 vacant?

11 A. Again I have no knowledge as to  
12 what he investigated and what he didn't.  
13 If he said so in his testimony then please  
14 refresh my memory. Whether he knew or did  
15 not know, I don't know. But to the extent  
16 that bit of information would have altered  
17 his opinion or my opinion, I don't believe  
18 it does.

19 Q. Okay. You didn't answer my  
20 question. My question is: If Mr. Tener  
21 had performed a proper marketability  
22 analysis, shouldn't he have identified  
23 this data?

24 A. Yes, if Mr. Tener had done a  
25 detailed marketability analysis, that

1 HEDDEN

2 property would or should have been  
3 considered.

4 Q. And are you aware --

5 A. And accepted or rejected as  
6 appropriate.

7 Q. Are you aware of him even  
8 considering it?

9 A. I am not aware.

10 Q. You didn't see anything in his  
11 work papers about this; right?

12 A. Correct, there was nothing in his  
13 work papers. Again, was it mentioned in  
14 his deposition? I don't recall. If it  
15 is, then it's in his deposition but I  
16 don't recall.

17 Q. Okay. Now if this data wasn't  
18 identified and you're not aware of any  
19 specific reasons why it should have been  
20 accepted or rejected, how can you be  
21 certain that Mr. Tener's conclusion that  
22 there is demand for a 21,500 square foot  
23 retail space in this specific market of  
24 Brooklyn at a price of a hundred dollars  
25 per square foot is credible and

1 HEDDEN

2 reasonable?

3 A. I think Mr. Tener identifies this  
4 as a taxpayer type of location, right, so  
5 when he describes his definition of the  
6 retail at this location, he calls it I  
7 think a taxpayer which is again a small  
8 retail development. In my eye, when he  
9 talked about taxpayer, it was from my  
10 perspective that he was talking about an  
11 owner-occupied destination. So obviously  
12 that doesn't fit with the type of retail  
13 that we've alluded to across the street.  
14 So his definition of what this retail  
15 building would be is not consistent with  
16 the same kind of retail that you've  
17 described for that other vacancy across  
18 the street. So in a marketability  
19 analysis, one would have included it in  
20 his calculation of supply or would have  
21 excluded it for that very reason.

22 Q. But he didn't do either; right?

23 A. Again, I am not aware of what he  
24 did or did not do in that regard.

25 Q. Okay. Do you know what the

1 HEDDEN

2 asking price as of April 15, 2019 was for  
3 that 14,895 square foot retail space  
4 across the street?

5 A. No.

6 Q. Are you aware that it was -- had  
7 an asking price of \$60 per square foot  
8 with modified gross lease terms?

9 A. No.

10 Q. Okay. What, if anything, did  
11 that tell you about Mr. Tener's conclusion  
12 that a 21,500 square foot building across  
13 the street could command a rent of \$100  
14 per square foot?

15 A. I have no opinion.

16 Q. You don't have any opinion?

17 A. No.

18 Q. Why not?

19 A. Because that would involve an  
20 analysis that was not undertaken so it  
21 would be remiss of me to offer an opinion  
22 of such magnitude without having done any  
23 appropriate background or research. I  
24 have no knowledge about the asking price  
25 or the conditions of the lease offering.

1 HEDDEN

2 Q. If you have not done that  
3 research, how can you at the same time  
4 opine that Mr. Tener's conclusion is  
5 credible and reasonable?

6 A. Mr. Tener's analysis of the  
7 retail had a good number of leases in  
8 there and it showed certain price points  
9 for space that were used for retail and  
10 Mr. Tener's opinion based upon that  
11 analysis was as he's opined in his report  
12 and his work papers. So based on his  
13 adequacy of the data or the amount of the  
14 data that was there in his professional  
15 opinion, that's his opinion. And again,  
16 based on my review of that and given the  
17 context of this process and the  
18 third-party appraiser as described in the  
19 lease addenda would ferret out whether or  
20 not it was appropriate use or appropriate  
21 conclusion with their -- under their scope  
22 of work.

23 Q. What is feasibility rent?

24 A. It's that rent necessary to  
25 satisfy all the factors of production in



1 HEDDEN

2 the development of a site.

3 Q. So the rent necessary to justify  
4 new construction; right?

5 A. Yes.

6 Q. And in order to calculate  
7 feasibility rent, you need to understand a  
8 lot of -- you have to have a lot of data  
9 points; right?

10 A. Yes.

11 Q. You need to know the site  
12 preparation costs; right?

13 A. One of the things that are  
14 considered. You need to know your  
15 construction cost.

16 Q. Entrepreneurial incentive; right?

17 A. Depending.

18 Q. What do you mean depending?

19 A. Certain buildings are built with  
20 entrepreneurial incentive and some  
21 buildings aren't, so it depends on what  
22 you assume is being constructed on the  
23 site.

24 Q. What buildings are built without  
25 entrepreneurial incentive?

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2 A. End user.

3 Q. Okay, but whether you call it  
4 entrepreneurial incentive or otherwise,  
5 there needs to be some incentive for that  
6 end user to build the property; right?

7 A. Yes.

8 Q. And so --

9 A. Sometimes in the selling of  
10 goods. Again a special purpose like a  
11 McDonald's. You build a McDonald's and  
12 then you sell hamburgers. There's your  
13 incentive is to sell product out of an  
14 establishment and that's your incentive.

15 Q. And it can't be -- in order to  
16 justify the construction of a site for an  
17 end user, it can't be a risky endeavor.  
18 They want it to be a relatively safe  
19 investment; right?

20 A. Yes, some level of risk is there  
21 but you would hope that you've analyzed  
22 your risk profile enough that it's not  
23 risky enough to entice equity and debt to  
24 your deal.

25 Q. And a rational developer or end

1 HEDDEN

2 user would not pay more to build its own  
3 building than it could to rent the same  
4 building from somebody else that's already  
5 built; right?

6 A. It would depend upon the -- it  
7 would depend upon the end user or the  
8 developer, their incentive; right? So  
9 they would either rent but if they didn't  
10 want to rent from somebody else but wanted  
11 to own, then they would again own rather  
12 than rent so it depends upon their  
13 perspective.

14 Q. Right, but let's talk about this  
15 specific situation. If we're talking  
16 about a 20-year term, they would only  
17 control the property for 20 years; right?

18 A. Correct.

19 Q. With no reversion value; right?

20 A. Correct, unless they would  
21 negotiate extensions.

22 Q. Right. So if we're talking about  
23 a 20-year period, even though you're  
24 saying how they would own the building,  
25 they are renting the space for 20 years;

1 HEDDEN

2 right?

3 A. Correct.

4 Q. Okay. And over that same 20-year  
5 period, if they could rent a preexisting  
6 building for a lower price, wouldn't that  
7 be the rational decision for that business  
8 owner?

9 A. All other things being equal but  
10 this has a unique location on a unique  
11 block. So to the extent that this affords  
12 that tenant, if you will, on the ground  
13 lease a competitive advantage to be  
14 located at 840 Atlantic Avenue, then they  
15 would opt to rent here rather than rent  
16 somewhere else.

17 Q. I'm glad you brought that up.  
18 What is unique and special about this  
19 particular location for a retail use?

20 A. It's unique as part of the M1  
21 zoning. That's what makes it unique.  
22 It's part of a redevelopment initiative in  
23 Brooklyn under the M-Crown zoning.

24 Q. But you just testified that this  
25 property would give somebody a competitive

1 HEDDEN

2 advantage. Why?

3 A. Because of the traffic flow,  
4 because of the fact that it's on Atlantic  
5 Avenue and it's got pretty good exposure.  
6 It's a corner location, it's got dual  
7 access, it's got, you know, a couple of  
8 other benefits that would go to an  
9 occupant of this site like McDonald's is  
10 enjoying right now.

11 Q. So in order to be comparable,  
12 other locations that you're using to  
13 arrive at an estimated rent for the  
14 property would have to share those same  
15 characteristics; right? Good traffic  
16 flow, good corner location; right? Same  
17 size?

18 A. So repeat the question. I  
19 understand the criteria that you've just  
20 laid out but can you explain the question  
21 or repeat it?

22 Q. You said that this specific site  
23 would give somebody a competitive  
24 advantage because of the traffic flow, the  
25 fact that it's on Atlantic Avenue, a

1 HEDDEN

2 corner location, so those are all the  
3 criteria that you would need to look at if  
4 you're looking for comps; right?

5 A. For a hypothetical retail use;  
6 correct.

7 Q. Okay. And the comps that  
8 Mr. Tener used in his analysis to arrive  
9 at the hundred dollars rent per square  
10 foot, do they share those characteristics?

11 A. I'm not aware.

12 Q. Did you do any research to  
13 determine whether they do?

14 A. No.

15 Q. And if they don't share those  
16 characteristics, are they appropriate  
17 comps?

18 MR. KOH: Objection. Go ahead.

19 THE WITNESS: They are  
20 appropriate to the extent they have  
21 led Mr. Tener to the conclusion of the  
22 rent that he opines to for the subject  
23 property. So in that context, they  
24 are appropriate because they took  
25 Mr. Tener to his ultimate conclusion

1 HEDDEN

2 which I found to be credible.

3 BY MR. WALSH:

4 Q. Okay. So if Mr. Tener had come  
5 across a property in Juneau, Alaska that  
6 he believed was comparable, would you be  
7 satisfied that that is, in fact, an  
8 appropriate comp for Mr. Tener to use in  
9 his analysis of fair market rent for this  
10 property?

11 MR. KOH: Objection. Go ahead.

12 THE WITNESS: If I was hired as  
13 the third-party appraisal and looked  
14 at this with the scope of work that it  
15 would have included, scrubbing the  
16 data like you're inferring, then I  
17 probably would have under that  
18 hypothetical you've just laid out, no,  
19 I would definitely say it's not  
20 appropriate and get it out of your  
21 report.

22 BY MR. WALSH:

23 Q. Okay. So did you do that here?

24 A. No.

25 Q. Why not?

HEDDEN

A. I wasn't asked to do that. My role here is to opine as to the inside the four corners of his report, inside his work papers, to determine whether or not he fulfilled the requirements under USPAP in terms of checking the boxes for typical USPAP compliance and to interpret the lease agreement to see if Mr. Tener's appraisal report complied with those issues and then to opine as to whether or not the ultimate conclusion was credible based on the document, the information contained therein and to permit the appraisal process to go forward in the selection of a third appraiser, and then that's basically the extent of my involvement and the root of my expert report.

Q. So are you saying that you approached this differently than you would have approached it if you had been hired as the third independent appraiser?

A. Yes, I think that's clear in the way my report is written and it's totally



1 HEDDEN

2 transparent as to my role and scope of  
3 work in this matter.

4 Q. Are you aware of any business  
5 that would build the hypothetical  
6 improvement at the cost estimated by  
7 Mr. Tener and at the rent that they would  
8 be required to pay in order to build that  
9 building?

10 A. No, I do not know of any  
11 developer because again, the way you  
12 phrase that question would have assumed  
13 that there was a third-party developer or  
14 investor building a building for someone  
15 else. So I don't know anybody that would  
16 be in that market.

17 Q. My question did not ask for that  
18 assumption. My question is: Are you  
19 aware of any business that would construct  
20 a building on that property for its own  
21 use, paying the rent Mr. Tener assumes  
22 they would have to pay, and paying the  
23 construction costs they would have to pay,  
24 are you aware of any business that would  
25 do that?

1 HEDDEN

2 A. So when you -- I'm sorry, just  
3 for clarification, when you said rent,  
4 you're talking about a ground rent, not  
5 rent to rent the building, that's where  
6 the confusion lies.

7 Q. You're not aware of any business  
8 that would take that risk?

9 A. That is correct. I have not done  
10 that investigation to determine if there  
11 was an actual user that would take that  
12 risk.

13 Q. Okay. And you're also not aware  
14 if Mr. Tener did that analysis; right?

15 A. Correct.

16 Q. Now in estimating construction  
17 costs, Mr. Tener relied entirely on cost  
18 data contained in Marshall & Swift;  
19 correct?

20 A. Yes.

21 Q. Do you recall what class of  
22 construction Mr. Tener assumed for his  
23 hypothetical improvement?

24 A. I believe it was a wood frame  
25 with a masonry basement, a class C, what

1 HEDDEN

2 they call class C or masonry, with a  
3 framed construction, upper level. I  
4 believe that's my best recollection  
5 without looking at the work papers.

6 Q. So Mr. Tener testified that he  
7 assumed a low cost class D construction.  
8 Do you recall that?

9 A. Yes, that is my recollection.

10 Q. Are you aware of any low cost  
11 class D buildings that had been built in  
12 Brooklyn within the past 20 years?

13 A. No.

14 Q. Okay. Does that -- does the  
15 absence of any construction of low cost  
16 class D buildings lead you to any  
17 conclusions about the reasonableness of  
18 assuming cost of construction using low  
19 cost class D buildings by Mr. Tener?

20 A. I mean that was his assumption.  
21 That was his hypothetical construct that  
22 he uses in this analysis and it took him  
23 to the conclusion for the residual  
24 analysis that he so opined.

25 Q. What data are you aware of that

1 HEDDEN

2 leads you to believe that it was credible  
3 and reasonable for Mr. Tener to use low  
4 cost class D construction costs in his  
5 analysis?

6 A. Well, to the extent that it's a  
7 hypothetical and it was clearly a  
8 construct made for this scope of work that  
9 he was fulfilling in terms of going  
10 through a land residual process under a  
11 certain hypothetical situation, I felt  
12 that it was -- comes to a conclusion which  
13 exceeds the other approach and the  
14 standard approach that he uses. And so  
15 therefore he says that he gives it as a  
16 supportive check so therefore I paid it no  
17 mind and left it to the third-party  
18 appraisal to figure out.

19 Q. Well, but you concluded that his  
20 analysis was credible and reasonable;  
21 right?

22 A. Correct.

23 Q. And so in order for you to reach  
24 that conclusion, wouldn't the assumptions  
25 that he made have to be credible and

1 HEDDEN

2 reasonable?

3 A. Yes.

4 Q. Okay. So what data did you rely  
5 on in order to conclude that it was  
6 credible and reasonable to assume low cost  
7 class D construction costs?

8 A. Well, to the extent that you can  
9 do it in Marshall's valuation service and  
10 he uses and he recites the book and page  
11 and the multipliers and the like and that  
12 was his assumption in his hypothetical  
13 that that could be done. So I don't have  
14 any independent knowledge of that but to  
15 the extent that he pulled it from a  
16 credible source and referenced it  
17 accordingly and the fact that he applied  
18 the appropriate multipliers for location  
19 and for time led me to the conclusion that  
20 overall his technique and his method was  
21 credible.

22 Q. Okay. What --

23 A. I don't have an opinion as to the  
24 result. I mean I wasn't asked to have any  
25 independent valuation opinions here so I

1 HEDDEN

2 don't have an opinion as to other than the  
3 fact that the material was credible.

4 Q. Okay. So you're not aware of any  
5 data supporting a demand for a 21,500  
6 square foot retail building at this  
7 property; right?

8 A. It could have been smaller, it  
9 could have been higher. I have no idea  
10 because again his analysis is only to use  
11 that commercial zoning area that was  
12 permitted under the commercial zone. It's  
13 clearly a hypothetical construct on his  
14 part. I'm not aware of anything else.

15 Q. Okay. I'd like you to listen to  
16 my question and answer my question.

17 You're not aware of any data  
18 supporting demand for a 21,500 square foot  
19 retail building at this property; right?

20 A. I personally am not aware, no.

21 Q. And you're not aware of any data  
22 supporting demand for a low cost class D  
23 building at this property; right?

24 A. That's correct, I am not.

25 Q. Okay, are you aware of any data

1 HEDDEN

2 supporting Mr. Tener's conclusion that an  
3 end user would pay a hundred dollars per  
4 square foot for low cost class D  
5 construction at this site?

6 A. I don't believe Mr. Tener  
7 concluded to a hundred dollars a square  
8 foot. My recollection is that he used a  
9 rent at the lower end of the scale after  
10 an allowance for expenses closer to the  
11 70- or \$80 a foot. I don't believe it was  
12 a hundred.

13 Q. Whatever number he used, are you  
14 aware of any data supporting his  
15 conclusion that an end user would pay  
16 whatever price he estimated for low cost  
17 class D construction at this site?

18 MR. KOH: Objection. Go ahead.

19 THE WITNESS: Other than the  
20 market data that was contained within  
21 his lease analysis, which he opines  
22 and concludes, no, the information I  
23 relied on was contained in his  
24 workbooks.

25 ///

1 HEDDEN

2 BY MR. WALSH:

3 Q. Okay. Mr. Tener estimated  
4 construction costs to be \$117 per square  
5 foot of above grade retail area. Are you  
6 aware of any other construction in  
7 New York City within the past 10 years  
8 that has been this low?

9 A. No, I am not.

10 Q. So what have you been seeing over  
11 the past 10 years for retail buildings?

12 A. I have no opinion as I haven't  
13 done the research, I don't recall. I have  
14 no opinion as to what I've been seeing  
15 because I haven't seen anything like this  
16 in recent years.

17 Q. So you have no basis to determine  
18 whether that amount is reasonable or  
19 unreasonable; right?

20 A. I have a basis to believe that  
21 Marshall valuation said it could be  
22 constructed based on using cost manuals.  
23 That's what I have a belief in.

24 Q. But you're not aware of any low  
25 cost class D construction in New York in



1 HEDDEN

2 the past 10 or 20 years, are you?

3 MR. KOH: Objection. Go ahead.

4 THE WITNESS: I personally do  
5 not, no. I'm sure that if you scoured  
6 the market you'd find something  
7 somewhere but I don't have any  
8 personal knowledge of that.

9 BY MR. WALSH:

10 Q. Why are you sure that if you  
11 scoured the market somewhere you'd find  
12 it?

13 A. Because there's always a  
14 possibility. It's like you find it  
15 somewhere. To the extent that you have a  
16 frame infill construction somewhere in  
17 some neighborhood within the boroughs of  
18 New York, it's very possible that there's  
19 an infill retail project somewhere where  
20 somebody built a frame building and was  
21 able to achieve a cost commensurate with  
22 Marshall valuation. They use Marshall  
23 valuation based on actual case studies so  
24 if it can be done and it can be shown in  
25 the manuals then it can be accomplished.

1 HEDDEN

2 Where, I haven't the slightest idea.

3 Q. Now, Mr. Tener conceded at his  
4 deposition that the construction estimate  
5 does not account for either the cost of  
6 the interior build-out or an HVAC system.  
7 Shouldn't he have considered these  
8 additional costs since a tenant would need  
9 to pay those costs?

10 A. Not necessarily, no.

11 Q. Why?

12 A. That comes from the negotiation  
13 between the landlord and the tenant. The  
14 tenant would obviously factor that in  
15 their occupancy costs but as a return for  
16 the building and the land and with a  
17 retail work letter sometimes are called  
18 tenant improvements, the tenant only gets  
19 a box, what they call in the industry a  
20 vanilla box. So therefore, any interior  
21 improvement and/or oftentimes HVAC, which  
22 is to be debated, is left to a tenant to  
23 make their own improvements. The landlord  
24 doesn't provide that.

25 Q. But remember we're talking about

1 HEDDEN

2 an end user. Remember? We're not talking  
3 about a tenant. We're talking about a  
4 business building its own building; right?

5 A. Correct.

6 Q. So in that case shouldn't that  
7 cost have been considered since whoever is  
8 building this building would need to pay  
9 those costs in order to make the building  
10 usable?

11 MR. KOH: Objection.

12 THE WITNESS: You're right and  
13 then they would build it into the  
14 amortized cost over the 20-year period  
15 in which they occupy the building.  
16 And like any other retail user,  
17 oftentimes costs are amortized over  
18 that time of period based on their own  
19 tenant improvements and taken on their  
20 taxes accordingly.

21 BY MR. WALSH:

22 Q. But Mr. Tener did not consider  
23 those costs in his analysis; right?

24 A. Correct.

25 Q. But he should have; right?

1 HEDDEN

2 A. No, I don't agree.

3 Q. How is it credible for him to  
4 have ignored these costs? Can you explain  
5 that to me?

6 A. Mr. Tener's model was based on  
7 just a return on and return of a cost  
8 incurred to develop the frame building and  
9 the basement as he has alluded to in his  
10 model and that's how his analysis was  
11 conducted. Costs over and above that,  
12 which under your hypothetical would be  
13 borne by the tenant, are outside of his  
14 work -- his model.

15 Q. Wouldn't those costs be necessary  
16 to understand if the project is  
17 financially feasible for someone over a  
18 period of 20 years?

19 A. Well, based on our hypothetical  
20 conversation, now we're talking about an  
21 owner/user and they would make a  
22 determination as to whether it was  
23 feasible based on the number of widgets  
24 they could sell from that site. They have  
25 their own occupancy costs and they would

1 HEDDEN

2 make their own determination as to  
3 feasibility and whether or not their total  
4 occupancy costs would be supported by  
5 their retail operation.

6 Q. Right. But they would need to  
7 know what those costs are to make the  
8 determination whether it's financially  
9 feasible; right?

10 MR. KOH: Objection.

11 THE WITNESS: They would need  
12 that calculation.

13 BY MR. WALSH:

14 Q. So how is it credible to ignore  
15 those if they have to be considered?

16 A. You're on the other side of the  
17 equation. This side of the equation is  
18 from a landlord's perspective or again a  
19 typical frame building that gets you to a  
20 certain point in time. Your hypothetical  
21 then adds to additional costs that the  
22 tenant would reconcile but that's not  
23 necessary to be considered by Mr. Tener.  
24 It's not part of his calculation.

25 Q. Okay. If we can flip to

1 HEDDEN

2 paragraph 46 of your report.

3 A. Okay.

4 Q. And you write, "Appraisers enjoy  
5 broad discretion in deciding which factors  
6 are relevant to a particular valuation  
7 problem and how such factors impact the  
8 valuation, absent an agreement expressly  
9 requiring or precluding consideration of  
10 such factors."

11 What do you mean by this  
12 statement?

13 A. Well, this statement was taken  
14 from the Sevelka article that is footnoted  
15 below so the -- what I mean by it is  
16 exactly as it states is that they have  
17 broad discretion is to -- and it goes  
18 right to our previous conversation, that  
19 is, Mr. Tener enjoyed broad discretion in  
20 figuring out what factors were relevant in  
21 the particular valuation problem and how  
22 they impact the valuation. So absent an  
23 agreement expressly requiring or  
24 precluding consideration of such factors.  
25 So the lease was silent in terms of

HEDDEN

instruction to the appraiser, then therefore he's got broad discretion on how he calculated or what factors he uses in his residual analysis or more reaching, in a sales comparison analysis to the extent there were no comparable leases. So that is what this statement goes to and that's -- that which was in the article that was in the appraisal journal by Mr. Sevelka.

Q. Appraisers do not enjoy unfettered discretion; right?

A. No, they do not.

Q. Their conclusions must still be reasonable and credible; right?

A. They must be worthy of belief or credible under the definition set forth in USPAP.

Q. Have you ever determined that another appraiser's conclusions were not reasonable or credible?

A. Yes.

Q. Okay. So what were the circumstances of those? Just explain to

1 HEDDEN

2 me what it takes for an appraiser to abuse  
3 their discretion.

4 A. Well, based upon using  
5 methodologies that are bastardized or  
6 incorrectly applied in the valuation of  
7 properties. It could be appraisal  
8 adjustments that are double counted, it  
9 could be income approaches that are not  
10 reflective again in use of the expense  
11 ratios, leaving information out, leaving  
12 information in so more of an active --  
13 we're going to say -- it's not coming to  
14 me -- a covert act of bad behavior which I  
15 have rendered those kinds of opinions in  
16 the past during some of my other appraisal  
17 reviews for bank loans in other litigation  
18 cases.

19 Q. But sometimes an appraiser's  
20 conclusions can be so unreasonable that  
21 their valuation is unreliable, right, and  
22 not credible?

23 A. Yes.

24 Q. In paragraph 59 of your report,  
25 you say, "USPAP makes clear that the goal



1 HEDDEN

2 of its standards is not perfection but  
3 rather to ensure a level of competence and  
4 quality in the appraisal and appraisal  
5 review process to promote credible  
6 results."

7 Your own report is governed by  
8 USPAP; right?

9 A. Yes.

10 Q. And so your own results must be  
11 credible and reasonable; right?

12 A. Yes.

13 Q. Okay. How can your results be  
14 credible or reasonable if you did not  
15 conduct your own research to test the data  
16 used by Mr. Tener in the conclusions he  
17 reached from that data?

18 A. Because again another article  
19 that we go on in the next section, you're  
20 under appraisal reviews. I don't inject  
21 my own biases or my own opinions as to  
22 what I believe to be the value in this  
23 scope of work or in the intended use for  
24 users or the appraisal processes outlined  
25 in that addendum to this ground lease. So

HEDDEN

it's very focused and very transparent as to exactly what my role was here and as defined under USPAP. So therefore, my conclusion is consistent with USPAP and is credible based upon the situation and the scope that I was asked to opine on. If I were in the third-party appraiser, or if I had a different role or was asked to accomplish a different task, then I would have a different expert report but I'm not, and therefore, my conclusion is such that I find in this context that it was prepared, it's credible and believable and therefore the third-party appraiser could be then so selected and the process can move forward. I mean it's that simple.

Q. So I want you to assume for a moment that you were appointed as the third independent appraiser for this assignment. What critiques or criticisms would you have about Tom Tener's report if you had been appointed as the third appraiser?

MR. KOH: Objection. Answer if

1 HEDDEN

2 you can.

3 THE WITNESS: I have no opinion  
4 in that regard because I've never done  
5 that type of analysis where I've been  
6 asked to render that kind of opinion.  
7 So that opinion won't be evidenced in  
8 this matter and hypothetically I think  
9 that I would probably pull both  
10 appraisers together and have  
11 criticisms on both sides and try to  
12 reconcile between the two as to what  
13 was a reasonable middle ground, if you  
14 will, that both parties could agree  
15 to.

16 BY MR. WALSH:

17 Q. Now, how do you --

18 A. That's how I would be as a  
19 third-party appraiser, as a reconciler of  
20 the various opinions if it so could be  
21 reached. The language here is very  
22 confusing. The lease itself is the one  
23 that's caused this inconsistency between  
24 the two appraisers and the ability to  
25 ascertain a highest and best use based on

1 HEDDEN

2 the definitions set up in the lease  
3 agreement.

4 Q. So you believe that the language  
5 of the lease is what has caused the  
6 appraisers to arrive at different  
7 conclusions of value?

8 MR. KOH: Objection. Go ahead.

9 THE WITNESS: I think it's vague.  
10 I think it's caused the -- again as I  
11 see in other situations, it's the  
12 language in the lease agreement that  
13 allows the appraisers to -- allows,  
14 but which is not clear enough for them  
15 to dictate exactly how this -- and so  
16 that's where that prior reference to  
17 discretion, there's broad discretion  
18 on how appraisers approach these  
19 problems and so that's reason why I  
20 believe that the situation you find  
21 yourself in has caused a vast  
22 discrepancies in the values.

23 BY MR. WALSH:

24 Q. What language in the lease caused  
25 these problems?

1 HEDDEN

2 A. It could have been more  
3 prescriptive. It said use a standard  
4 approach. It said comparable leases when  
5 there are no comparable leases for 20-year  
6 terms.

7 Q. Let's stop there. How do you  
8 know that there are no comparable leases  
9 for 20-year terms?

10 A. Well, if you read the articles by  
11 Sevelka or others, trying to find leases  
12 for a 20-year term that trade in the  
13 marketplace is very complicated.

14 Q. Are you aware that Sharon  
15 Locatell identified more than a dozen  
16 comparable leases for a period of around  
17 20 years?

18 A. Well, were they for highest and  
19 best use as can be constructed here on the  
20 subject property? That's where we're  
21 going, right, the highest and best use  
22 conclusion. So to the extent that she  
23 found leases, were they, in fact,  
24 comparable.

25 Q. Let's talk about that, right,

1 HEDDEN

2 because you're saying that you testified a  
3 moment ago that the difference in  
4 valuation was caused by vague language in  
5 the lease. Are you now saying that the  
6 difference in value was caused by  
7 different highest and best use  
8 conclusions?

9 MR. KOH: Objection. Go ahead.

10 THE WITNESS: Yes.

11 BY MR. WALSH:

12 Q. So which is it, is it vague  
13 language in the lease or different highest  
14 and best use conclusions?

15 MR. KOH: Objection.

16 THE WITNESS: It's a combination.

17 BY MR. WALSH:

18 Q. Okay. So when you reviewed  
19 Sharon's report, you said you didn't read  
20 the whole thing, you read it quickly;  
21 right?

22 A. Yeah, I only focused on the  
23 highest and best use.

24 Q. And what highest and best use did  
25 she conclude was appropriate?

1 HEDDEN

2 A. Well, my recollection was that it  
3 was for a pad site.

4 Q. And did you -- and that's a big  
5 deal, right, because a different highest  
6 and best use could dramatically change the  
7 value of the property; right?

8 A. I think I testified to that  
9 earlier, yes.

10 Q. Okay. So what did you do to  
11 conclude that Sharon's highest and best  
12 use of a pad site was not credible or  
13 reasonable?

14 MR. KOH: Objection.

15 THE WITNESS: I don't have that  
16 opinion.

17 BY MR. WALSH:

18 Q. So you testified before that a  
19 property can't have two highest and best  
20 uses; right? Understanding at least -- I  
21 understand that sometimes there could be  
22 an interim highest and best use but let's  
23 put that aside for a second. There's got  
24 to be one highest and best use; right?

25 MR. KOH: Objection.

1 HEDDEN

2 THE WITNESS: Yes, I think we've  
3 talked about that the highest and best  
4 use there is one.

5 BY MR. WALSH:

6 Q. So one of them is wrong; right?

7 A. It's possible that both are  
8 wrong.

9 Q. Did you consider the fact that  
10 Sharon may be right in her analysis or did  
11 you not even consider that possibility?

12 A. Based on the fact pattern that I  
13 have before me of the zoning, of the  
14 M-Crown potentials for the future and  
15 given the location of this property, I did  
16 not believe that the highest and best use  
17 was anything different than that concluded  
18 by Mr. Tener.

19 Q. So it's your opinion that  
20 Sharon's -- Sharon Locatell's highest and  
21 best use conclusion is incorrect?

22 A. Again, I don't have that opinion.  
23 I just believe that Mr. Tener's conclusion  
24 is correct.

25 Q. Okay. But you didn't review



1 HEDDEN

2 Ms. Locatell's report in any detail or her  
3 work papers; right?

4 A. That is correct.

5 MR. WALSH: We're getting close  
6 to wrapping up. May we take a  
7 five-minute break?

8 MR. KOH: Yeah, that's fine. You  
9 say you're close to wrapping up?

10 MR. WALSH: Yeah, probably within  
11 a half hour I'd say.

12 MR. KOH: Okay, that's useful for  
13 me to know, thank you.

14 MR. WALSH: No promises but  
15 that's what I think.

16 THE WITNESS: What time do you  
17 want me back?

18 MR. WALSH: Why don't we come  
19 back at 4:10. We'll make it eight  
20 minutes.

21 THE VIDEOGRAPHER: The time is  
22 4:02 p.m. We're going off the record.

23 (Recess taken from 4:03 p.m. to  
24 4:13 p.m.)

25 THE VIDEOGRAPHER: The time is

1 HEDDEN

2 4:13 p.m. We're back on the record.

3 BY MR. WALSH:

4 Q. Okay. Mr. Hedden, do you recall  
5 Mr. Tener confirming at his deposition  
6 that he made multiple requests for a copy  
7 of the November 30, 2017 ground lease  
8 between Vanderbilt Atlantic Holdings and  
9 MMB Associates but that it was never  
10 provided to him?

11 A. Yes.

12 Q. Okay. And have you had an  
13 opportunity to review that lease?

14 A. Yes.

15 Q. And you were given an opportunity  
16 to review that lease before you issued  
17 your expert opinion; right?

18 A. Yes.

19 Q. Did you review that lease before  
20 you issued your expert opinion?

21 A. I did.

22 Q. So are you aware the lease  
23 provides that if McDonald's were to leave  
24 the property and the zoning remained the  
25 same as it was in April 2019, Vanderbilt's

1 HEDDEN

2 annual rent to MMB Associates would be  
3 \$360,000 per year?

4 A. Yes, I believe without the zoning  
5 change.

6 Q. Correct. So under current  
7 zoning, if McDonald's were to leave the  
8 property, Vanderbilt's annual rent to MMB  
9 Associates would be \$360,000 per year;  
10 right?

11 A. Yes, that's my recollection based  
12 on your representation. That seems to be  
13 right.

14 Q. Okay. Are you aware that the  
15 936 Second Avenue case requires in this  
16 case existing zoning to be considered in  
17 the analysis?

18 MR. KOH: Objection. Go ahead  
19 and answer.

20 THE WITNESS: I believe that to  
21 be the case.

22 BY MR. WALSH:

23 Q. Okay. Wasn't this a highly  
24 relevant data point for Mr. Tener to be  
25 aware of?

1 HEDDEN

2 A. Only if it was deemed to be  
3 between unrelated parties. So I would  
4 believe that it is relevant information  
5 unless it's not deemed to be arm's length.

6 Q. So let me -- I think -- I just  
7 want to make sure the record is clear that  
8 you believe it would be relevant  
9 information unless it's deemed to be not  
10 arm's length?

11 A. To rephrase, if it is not an  
12 arm's length transaction, then it is not  
13 relevant.

14 Q. Right. But if it was an arm's  
15 length transaction, it would be relevant?

16 MR. KOH: Objection. Go ahead.

17 THE WITNESS: Yes. Yes, that is  
18 true.

19 BY MR. WALSH:

20 Q. Do you know whether this was an  
21 arm's length transaction?

22 A. Based upon the -- I'm going to  
23 call it an organizational chart, based on  
24 the participants in the underlying  
25 landlord relationship of the ownership of

1 HEDDEN

2 that site, I did not in my looking at it  
3 consider this to be an arm's length  
4 relationship between the parties.

5 Q. Okay. Do you know if those  
6 organizational relationships that you're  
7 referring to existed at the time that  
8 lease was negotiated?

9 MR. KOH: Objection. Go ahead.

10 THE WITNESS: I do not know the  
11 timing of those relationships and when  
12 they were initiated.

13 BY MR. WALSH:

14 Q. Okay. Now if you were told that  
15 it was two parties negotiating with each  
16 other, right, with both parties clearly on  
17 opposite sides of the table, right, no --  
18 nobody is straddling both sides. If there  
19 were two parties on either side of the  
20 table negotiating that, would that be an  
21 arm's length transaction?

22 A. So to focus on the word "arm's  
23 length" we mean unrelated parties. There  
24 are no financial or relationship  
25 interconnections between the parties,

1 HEDDEN

2 right, they are totally separate from each  
3 other and there is no relationships,  
4 financial or otherwise? Is that what  
5 we're saying is arm's length?

6 Q. You're the one that introduced  
7 that term so I'm just trying to understand  
8 what we're talking about here.

9 A. I believe based on my review of  
10 the information that was given to me, both  
11 in terms of the exhibits and from the  
12 depositions, there is an interrelationship  
13 between the parties on that lease  
14 agreement, right, so between the landlord  
15 and the tenant in that lease that you're  
16 alluding to, they are somewhat financially  
17 related.

18 Q. And so does that automatically  
19 disqualify this lease from having any  
20 relevance in the analysis, that one fact?

21 A. Well, I think also the relevant  
22 fact in that lease is that the parties  
23 recognize the likelihood that -- or the  
24 possibility that the property could  
25 achieve a rezoning and there would be a

1 HEDDEN

2 significant amount of rent increase in the  
3 event they were successful in pursuing a  
4 rent -- a zoning change that would permit  
5 a higher and better use. So that  
6 consideration I felt relevant in the  
7 conclusion of the highest and best use of  
8 this property.

9 Q. Well, shouldn't Vanderbilt have  
10 provided this lease to Mr. Tener and let  
11 him dig into it and sort of understand  
12 those relationships and give him an  
13 opportunity to explore it?

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: Notwithstanding  
16 their providing that document or not,  
17 Mr. Tener was performing under the  
18 USPAP requirement to request it and he  
19 is within his rights to move forward  
20 with his report if it's not provided.  
21 He did what he could have done to  
22 request the lease and if it was not  
23 provided, then it does not prohibit  
24 Mr. Tener from reaching his opinion as  
25 to the market value or the market rent

1 HEDDEN

2 value of this property.

3 BY MR. WALSH:

4 Q. Okay. So any faults for not  
5 providing it would land at the feet of  
6 Vanderbilt, right, and not Mr. Tener?

7 MR. KOH: Objection. Go ahead.

8 THE WITNESS: That's correct.

9 MR. WALSH: Okay, I think I'm  
10 just about done. If I could just have  
11 five minutes just to make sure that  
12 I'm done and hopefully when I come  
13 back I'll have nothing more than a  
14 couple minutes, if anything.

15 THE VIDEOGRAPHER: Okay. The  
16 time is 4:22 p.m. We're going off the  
17 record.

18 (Recess taken from 4:22 p.m. to  
19 4:24 p.m.)

20 THE VIDEOGRAPHER: The time is  
21 4:24 p.m. We're back on the record.

22 MR. WALSH: Mr. Hedden, thank you  
23 very much for coming today and  
24 cooperating. I don't have any further  
25 questions for you at this time.



HEDDEN

THE WITNESS: Thank you.

MR. KOH: Thank you, Michael.

THE VIDEOGRAPHER: The time is  
4:25 p.m. We're going off the record.

(Time noted: 4:25 p.m.)

-----  
MICHAEL P. HEDDEN

Subscribed and sworn to before me  
this \_\_\_ day of \_\_\_\_\_, 2022.

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Notary Public

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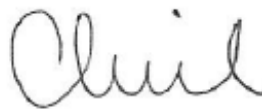
STATE OF NEW YORK       )  
  : ss.  
COUNTY OF NASSAU       )

I, CATHI IRISH, a Registered  
Professional Reporter, Certified Realtime  
Reporter, and Notary Public within and for  
the State of New York, do hereby certify:

That MICHAEL P. HEDDEN, the witness  
whose deposition is hereinbefore set  
forth, was duly sworn by me and that such  
deposition is a true record of the  
testimony given by the witness.

I further certify that I am not  
related to any of the parties to this  
action by blood or marriage, and that I am  
in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 22nd day of January,  
2022.



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CATHI IRISH, RPR, CRR, CLVS

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course handbook		

1                                   **\*\* ERRATA SHEET \*\***

2       **CASE: MCDONALD'S vs. VANDERBILT**

**DEPOSITION DATE: 1/20/2022**

3       **DEPONENT: MICHAEL P. HEDDEN**

4       **PAGE LINE(S)           CHANGE                                   REASON**

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                                  \_\_\_\_\_  
                                  **MICHAEL P. HEDDEN**

22

**SUBSCRIBED AND SWORN TO BEFORE ME**

23       **THIS        DAY OF        , 20\_\_\_\_.**

24

25       \_\_\_\_\_  
      **(NOTARY PUBLIC)**

\_\_\_\_\_  
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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

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COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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